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CHURCH AND STATE
Did the Founding Fathers Want Strict Separation or Just Non-Preferential Treatment?

The Plain Dealer Cleveland, OH, Sunday, July 23, 1995

Julia Lieblich
Newhouse News Service

Whether God is on their side or not, they are convinced they have the Founding Fathers.

Conservatives and liberals alike invoke the names of Madison and Jefferson to support their views on church-state issues: from school prayer and vouchers to the support of religious groups by government-funded institutions. Always contentious, the 200-year-old debate has taken on new urgency as the Religious Right accuses judges and politicians of driving religion from public life.

Rep. Ernest Istook, R-Okla., is among those who believe that the First Amendment allows the government to support religious activity. "Our Founding Fathers understood that our fundamental rights do not come from government, but from God," Istook told a House judiciary subcommittee on the Constitution.

But Nadine Strossen, president of the American Civil Liberties Union, maintains that the framers intended the government to take a hands-off role, neither helping nor hindering religion.

The wording is simple: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." But what the founders meant is tough to discern.

Leonard W. Levy, author of "The Establishment Clause: Religion and the First Amendment," notes that the "historical evidence . . does not speak in a single voice with clarity and insistence." It lends itself to contradictory interpretations and sometimes dubious efforts of interested parties to ascertain the framers' intent, he said.

To complicate matters further, some scholars say intent is irrelevant because it doesn't reflect today's political and social reality. And former judge Robert Bork, a scholar in legal studies at the American Enterprise Institute, is among those who prefer the phrase "original understanding," or what the Constitution would have meant to a reasonable person at the time.

"We're not trying to figure out what James Madison had in his skull," Bork said.

Still, scholars concur that given the frequency with which the founders' intent is invoked, it is critical to examine their actions.

Interpreters tend to fall into two camps: separationists who believe in a total division between matters of church and state, and nonpreferentialists, who say that nothing in the Constitution bans federal sponsorship of religion in general if no religion in particular is given preference.

Most scholars agree that the founders wanted to avoid replicating on the national level the experience of the states, which had a history of supporting one or more established religions. In James Madison's home state of Virginia, people had been forced to fund the Anglican Church through taxation, notes Rob Boston, author of "Why the Religious Right is Wrong." Quakers and Catholics were initially barred from the state. And during the "Great Persecution" from 1768 to 1774, Baptists were frequently jailed or whipped.

In this less-than-liberal climate, Madison fought hard for religious liberty as a member of the Virginia House of Delegates. When Patrick Henry introduced a bill in the Virginia legislature in 1784 that would have required "a moderate tax or contribution annually for the support of the Christian religion," Madison took his case against establishment to the people, Levy notes. Madison's paper, "Memorial and Remonstrance against Religious Assessments," now regarded as a classic in religious freedom, listed 15 reasons for rejecting Henry's bill.

"Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other sects?" Madison wrote.

Some scholars see the document as a nonpreferentialist tract. Daniel L. Dreisbach, professor of justice at American University, believes the paper shows Madison's fear of showing preference for one religion over another. He was not, Dreisbach argues, against facilitating religion in public life.

But others think that "Memorial and Remonstrance" demonstrates just as clearly a separationist position. "Madison believed that it was wrong to aid religion, whether one group or 500," said Boston, assistant communications director of Americans United for Separation of Church and State.

Bork, often called a nonpreferentialist, agrees that in "Memorial and Remonstrance" Madison made a strong argument for separation.

Bork believes it's irrelevant, however, given that Madison "didn't express these extreme separationist views to Congress during discussions of the First Amendment."

Separationists find any event or document that set the stage for the establishment clause relevant. And they cite Madison's 1785 resurrection in the Virginia legislature of Thomas Jefferson's 1777 bill for religious freedom as another example of Madison's commitment to church-state separation. "No man shall be compelled to frequent or support any religious worship, place or ministry whatsoever," the bill stated.

Still, during this same period, Madison recommended bills to protect Anglican church property, punish Sabbath breakers and people who disturbed public worship, and fix a date of prayer and fasting.

"Jefferson and Madison," Levy notes, "were by no means absolutists on the question of the separation of government and religion."

The topic of religion rarely came up during the Constitutional Convention of 1787, except when discussing the prohibition of religious tests for political office. Some delegates pressed for a recognition of Christianity in the document, but they were unsuccessful. The framers did not begin their deliberations with a prayer, and the final document contained no references to God.

Some scholars contend that mentions of God were omitted because Christianity was accepted as the basis of common law, and the Declaration of Independence introducing the Constitution referred to God. Boston thinks the decision was more deliberate. "They had to be careful not to put anything in that would lead people to believe the government had any right to meddle in religion," he said.

Deliberations on the Bill of Rights brought the topic of religion to the fore. Madison wrote the first draft of what would become the First Amendment: "The civil rights of none shall be abridged on account of religious belief, nor shall any national religion be established, nor shall the full and equal rights of Conscience in any manner or on any pretext be infringed."

Supreme Court Chief Justice William H. Rehnquist wrote in a 1985 opinion that the amendment "forbade the establishment of a national religion," but did not "prohibit the federal government from providing nondiscriminatory aid to religion." Separationists, however, say the amendment was meant to reassure the states that Congress had no power to interfere with state establishments nor support any religious group through aid, sponsorship or tax support.

Furthermore, Levy notes, the amendment was meant to restrict Congress to its stated powers, not create new ones, such as the right to aid religious groups.

Records of the Senate debate on the amendment leave much to be desired. "They were prepared by a man accused of being an ardent partisan, even a drunk," said Dreisbach. It is clear, however, that the Senate considered alternate versions that forbid establishing one religious sect in preference to others. The failure of these motions, separationists argue, indicates that the Senate wanted to do more than outlaw preference. But Bork doesn't see "how you can read that into what they didn't adopt."

The Senate eventually came up with its own version of the bill: "Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion." The House, however, refused to accept the wording, which separationists believe shows that it wanted a rejection of government aid, not just a rejection of interference.

Although Madison wrote that he believed in "a perfect separation between ecclesiastical and civil matters," Levy notes that Madison's separation was less than perfect during his presidency.

On one hand, Boston notes, Madison vetoed an act incorporating the Episcopal church in the District of Columbia that gave the church authority to care for the poor. And he vetoed a proposed land grant to a Baptist church in Mississippi. But he also voted for days of fasting and prayer and approved of chaplains for the armed forces.

Yet Madison later expressed disapproval of both practices, regarding them as a violation of the First Amendment. While separationists laud this about-face, Bork maintains: "You can't give (the amendment) meaning retroactively."

Still, many separationists and nonpreferentialists lay claim to a document drafted a decade after the First Congress' deliberations: Thomas Jefferson's 1802 letter to a group of Baptists describing the First Amendment. In it he penned his famous metaphor: the "wall of separation between church and state."

Separationists say it's a two-way wall also intended to keep the church from infringing in matters of state. Some nonpreferentialists say it's a one-directional wall that prevents the state from interfering with the church while allowing the government to provide nonpreferential subsidy and acknowledgment of religion.

"Government did have an interest in facilitating religion in public life. That was deemed essential to the social order," said Dreisbach.

But separationists believe that government aid to religion disrupts that order. "People who want to subsidize or endorse religion because morality is a good thing don't understand history," said Levy. "When the state of New York out of the goodness of its heart decided to promote prayer in public school, it prescribed (a prayer that was) bland and meaningless, which is insulting to particular denominations.

"The intention is good," he notes, "but it's disastrous when the government gets authority over religion." Some scholars contend that mentions of God were omitted because Christianity was accepted as the basis of common law.

Lieblich writes about religion, ethics and morality for the Newhouse News Service.

AFFIRMING RELIGIOUS NEUTRALITY

Chicago Tribune
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Sunday, July 2, 1995

Editorial

With its decision last week requiring the University of Virginia to fund a student-published Christian publication, the Supreme Court took a historic step toward what the 1st Amendment was meant to assure: government neutrality toward religion.

The verdict puts no government body in the business of endorsing any faith or sect. All it does is grant religion its proper place in the life of the nation.

University of Virginia students pay a $14-per-semester fee into a "student activities fund" to support more than 100 extracurricular organizations "related to the educational purpose of the university." These include groups that publish student news and opinion.

But when a group applied for funds to print an evangelical Christian newspaper, it was refused, since regulations prohibited funding any activity that "promotes or manifests a particular belief in or about a deity."

The group sued, arguing that its free-speech rights had been denied. The university responded that subsidizing a religious publication with mandatory student fees would violate the 1st Amendment clause forbidding an "establishment of religion."

The Supreme Court, however, properly concluded that the establishment clause does not bar this sort of aid--and that exclusion of religious groups from funding amounts to the deliberate suppression of one viewpoint, in violation of the free-speech guarantee.

The religion clauses of the 1st Amendment, wrote Justice Anthony Kennedy for the five-member majority, are meant to prevent the government from putting its thumb on either side of the scale: "The guarantee of neutrality is respected, not offended, when the government, folowing neutral criteria, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse."

That is exactly right. The framers of the Constitution did not want Americans taxed for the special purpose of aiding churches. But neither did they want religious groups and individuals to be punished for their beliefs. By removing the ban on religious groups, the University of Virginia would not be creating an incentive for students to espouse religious messages--only removing a penalty that now exists.

Leaders of the religious Right, who have been pressing for a so-called religious-equality amendment to the Constitution, took heart from the Supreme Court's decision--as they had a right to.

We trust that they will be equally enthusiastic when they understand that the ruling opens the door not just for Christians but for members of all religious groups--including some that they may find less than appealing. But that's what neutrality is all about.

JUSTICES SIDE WITH RELIGIOUS GROUP ON FUNDS

The Boston Globe
Copyright 1995
Friday, June 30, 1995

Ana Puga
Globe Staff

Washington -- Providing encouragement to some religious groups, the Supreme Court ruled yesterday that because of constitutional free speech guarantees, a state university may not deny financial support to a Christian student publication while providing funds for secular student activities.

The decision alarmed advocates of a strict separation between church and state, including some Jewish groups, but delighted many Christian organizations, because it relaxed the court's general rule that government may not support religious activities.

Some Christian groups said they hoped the 5-4 ruling against the University of Virginia would lay the groundwork for Supreme Court approval of school voucher programs that would provide government funds for children to attend religious schools. The decision might also send the message to public schools that they may not prohibit speakers at events like graduations from speaking about religious subjects, court analysts said.

To obey the constitutional ban on the establishment of a state religion, Justice Anthony Kennedy wrote for the court's majority, "it was not necessary for the university to deny eligibility to student publications because of their viewpoint."

Kennedy concluded that the University of Virginia's refusal to subsidize the printing costs of a student Christian magazine violated the free speech rights of the students because it unconstitutionally decided to silence their particular message. In so doing, he and the other members of a majority that included Justices Sandra Day O'Connor, Antonin Scalia, Clarence Thomas and Chief Justice William Rehnquist wrestled with a longstanding constitutional tension between two clauses of the First Amendment. One clause prohibits the establishment of a state religion and the other mandates freedom of speech.

Writing for the dissenters, Justice David Souter noted that the court "today, for the first time, approves direct funding of core religious activities by an arm of the government." Justices John Paul Stevens, Ruth Bader Ginsburg and Stephen Breyer joined the dissent.

If the constitutional ban on state religion "was meant to accomplish nothing else, it was meant to bar this use of public money," Souter wrote.

Rosenberger v. University of Virginia began in 1991, when a student, Ronald Rosenberger, applied to the school for $5,800 to cover the printing costs of Wide Awake, a Christian magazine. A committee of the student council denied the funds on the grounds that the school could not constitutionally support a religious group.

Rosenberger filed suit in federal court, where he lost. But yesterday the Supreme Court overturned the decision.

An ebullient Rosenberger handed out releases with his reaction: "The court has simply restored a level playing field for students of all faiths."

The Christian Legal Society and dozens of other Christian groups that filed friend-of-the-court briefs on Rosenberger's side were also elated.

"The court rejected the idea that any time the government funds a religion, that is unconstitutional," said Greg Baylor, an attorney with the society. "It said that the government doesn't have to be hostile to religion."

But the American Jewish Congress was dismayed, because as a practical matter, when the government gets involved in funding religions, religious minorities often suffer, said an attorney for the group, Lois Waldman.

"Jewish groups have always been very strong supporters of the free exercise and the establishment clauses," Waldman said. "As a minority religion, we won't do well when colleges start funding religious groups."

A University of Virginia spokeswoman, Louise Dudley, said that the school's governing board will change its funding policy to comply with the court's decision.

Legal analysts said the decision represents an important but subtle shift in the court's balancing of speech and religious freedoms.

Lee Bollinger, a First Amendment expert and former dean of the University of Michigan Law School, said: "This not a major case, in the sense of establishing a major set of principles. . . . But it provides an answer for an important dilemma facing public institutions: to what extent are they obliged to provide support to religious organizations for the purposes of propagating their viewpoint?"

Mark Tushnet, a professor at Georgetown University Law Center, said the ruling would not support arguments in favor of school prayer, but could lead to more expressions of religious views in public schools, such as teachers opening classes with religious readings.

"If you think of the metaphor of a wall between church and state," Tushnet said, "the court has taken out one brick in that wall."

HIGH COURT ENDS TERM
Court Calls for 'Neutral' Approach to Religion Issues Judiciary

Los Angeles Times
Copyright, Los Angeles Times 1995
Friday, June 30, 1995

David G. Savage
Times Staff Writer

The Supreme Court gave religious-rights activists two important victories Thursday, ruling that the government may not deny funding or free-speech protections to groups simply because of their religious beliefs.

Instead, the justices insisted that officials follow a "neutral" and "evenhanded" approach to matters of religion so that students or church groups are not put at a disadvantage because of their faith.

The opinions in the two cases echo the views of religious-rights activists, who have complained in recent years that public officials frequently discriminate against those whose message is religious.

For example, some school officials have believed that they must tolerate displays of offensive messages on T-shirts worn by students in observance of free-speech protections, while banning the display of references to Jesus on the theory that these references would violate the separation-of-church-and-state rule.

Similarly, some city officials have believed that they cannot ban burning of the American flag in a public park because the action is a free-speech exercise but they must prohibit the display of a cross or creche because it is explicitly religious.

In the two rulings, the court's conservative justices sought to knock down the apparent double standard affecting religion.

In an Ohio case, the court upheld the display of a 10-foot cross in a public park near the state capital. Because other groups had rallied and displayed banners there, the cross could not be excluded simply because it is a religious symbol, the court said in a 7-2 vote.

"Private religious speech, far from being a First Amendment orphan, is as fully protected under the free-speech clause as secular private expression," wrote Justice Antonin Scalia for the court in the case (Capitol Square vs. Pinette, 94-780).

In the second case, the court ruled, 5 to 4, that the University of Virginia wrongly denied subsidies to a Christian students' magazine. The ruling marked the first time that the court has clearly upheld the use of public money to subsidize the espousal of religious views, lawyers said.

Religious-rights activists hailed the two rulings and said that they indicate the court would uphold publicly funded "vouchers" for students to attend religious schools. The decisions also settle a long-running battle over Christmas displays by making clear that private groups may erect a creche in a public square so long as other displays are permitted there as well.

"The Supreme Court has sent a message loud and clear that it is unconstitutional to treat religious students as second-class citizens or religious speech as second-class speech," said Ronald Rosenberger, a former University of Virginia student who founded "Wide Awake," a campus magazine espousing "a Christian perspective" on contemporary issues.

In 1991, the university subsidized the costs of other student publications, including those sponsored by Muslim and Jewish students. But campus officials turned down Rosenberger's request for funds because his magazine "manifests a particular belief in or about a deity."

A federal appeals court in Richmond sided with the university's decision, concluding that the First Amendment's ban on an "establishment of religion" prohibited the use of public money to support a religious publication.

Disagreeing in the case (Rosenberger vs. University of Virginia, 94-329), the high court said that state officials cannot discriminate against religious groups strictly because of their beliefs.

"The neutrality commanded of the state by the First Amendment was compromised by the university's course of action," Justice Anthony M. Kennedy wrote for the 5-4 majority. It is "a denial of the right of free speech and would risk fostering pervasive bias or hostility to religion" if the university could deny subsidies to the Christian students, he said.

In a sharply worded dissent, Justice David H. Souter said that the majority "for the first time, approves direct funding of core religious activities by an arm of the state." He was joined by Justices John Paul Stevens, Ruth Bader Ginsburg and Steven G. Breyer.

The court majority, however, noted three important limits on its ruling.

First, the university itself was not promoting Christianity. Rather, it was funding all student publications on a neutral basis.

* Second, the money was not going to a church but rather to a student group.

And third, the funds were not supporting an explicitly religious activity, such as a worship service or a retreat.

Nonetheless, before Thursday, the court had taken the view in various opinions that public money could not be used to promote religious beliefs.

Advocates of church-state separation faulted the court for knocking down a once-solid barrier.

"This is a miserable decision," said Barry W. Lynn, director of Americans United for Separation of Church and State. "Christians at a university have every right to evangelize through publications but they shouldn't be allowed to pick other students' pockets to pay for it."

A leader of People for the American Way, a civil-liberties group that had supported the university's position, saw a silver lining in the high court's action.

"Both rulings should knock the wind out of the sails of the right-wing forces pursuing a so-called religious equality amendment to the Constitution," said Elliot Mincberg, legal director for the group.

On Capitol Hill, religious rights advocates have been pressing for an amendment to protect religious liberty and student-led prayer in schools.

But Mincberg said that the amendment is not needed since the court "makes absolutely clear that the First Amendment is not hostile to religion."

SUPREME COURT ASSERTS RELIGIOUS FREEDOM

St. Petersburg Times
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Friday, June 30, 1995

Ellen Debenport

In two long-awaited cases about religious freedom, the Supreme Court ruled Thursday that the Ku Klux Klan had a right to erect a cross outside the state Capitol in Ohio and that the University of Virginia should have paid to publish a Christian student magazine.

In neither case, the court said, was government promoting religion. And in both cases, government already had accommodated non-religious groups and publications, so it should do the same for those with a religious message.

The rulings "amount to the wall of separation between church and state taking two direct mortar shots," said Barry Lynn of Americans United for the Separation of Church and State.

But others saw victory.

"What it means is that religious people can, with confidence, speak and distribute literature and set up displays in the same public areas that people with secular messages can go," said Nicole Kerr, executive director of the Liberty Counsel in Orlando, a group of lawyers who work on religious rights cases.

"They have no need to fear government oppression."

The Supreme Court, in opinions written with a hint of exasperation, said it had been trying for years to make this principle clear. A few years ago, the court ruled that any school offering its facilities to secular groups had to offer them to religious groups as well. The same thinking applies here, the majorities said.

But the court splintered on both rulings.

Seven of the nine justices agreed the KKK's cross should be allowed on Capitol Square in Columbus, Ohio, but for different reasons. Four, led by Justice Antonin Scalia, said government must allow religious speech in public forums, as long as government doesn't initiate it.

"We have consistently held that it is no violation for government to enact neutral policies that happen to benefit religion," Scalia wrote.

Three others, led by Justice David Souter, said the cross would be okay if it had a sign saying government was not endorsing the religion.

Justice Clarence Thomas, the only black member of the court, wrote a separate opinion saying he didn't believe for a minute that the KKK was using the cross to celebrate Christmas. "The Klan simply has appropriated one of the most sacred of religious symbols as a symbol of hate," he wrote. But even if the Klan's message was political rather than religious, he concluded, free speech should be allowed in an established public forum like Ohio's Capitol Square.

The 10-foot cross stood for one day before vandals tore it down.

The Virginia case more deeply divided the court.

The university in Charlottesville, which the court noted was one of Thomas Jefferson's proudest achievements, refused to pay the printing costs of a student magazine called Wide Awake: A Christian Perspective at the University of Virginia. Editor Ronald Rosenberger said his religious rights were violated, especially because the school funneled student activity fees to more than 100 other groups, including Jewish and Muslim publications.

Five justices agreed with Rosenberger. Four dissenters were horrified.

"The court today, for the first time, approves direct funding of core religious activities by an arm of the state," wrote Souter, joined by Justices John Paul Stevens, Ruth Bader Ginsburg and Stephen Breyer.

But in this case, the majority argued, the university would have paid the printer, not a religious group, and benefit to religion would be "incidental."

"They certainly leave the door wide open for things like (school) vouchers and other forms of state support for religion," said Elliot Mincberg, executive vice president and legal director of People for the American Way. "But it's very important to point out that it only leaves the door open. It doesn't walk through the door."

The court's decisions come at a time when the religious right is complaining that government, including the high court, is hostile to religion. At a congressional field hearing in Tampa last week, children told of getting in trouble at school for reading their Bibles or drawing pictures of Jesus.

Congress is considering a constitutional amendment that would encourage organized school prayer and public displays of religion. It also would allow direct payments from government to religious organizations, such as schools.

But religious freedom is not threatened, said Mincberg.

"These decisions further show," he said, "there's no reason to play political football with the First Amendment out of a perception there's hostility going around."

- Information from Reuter and Scripps Howard News Service was used in this story.

EXCERPTS FROM SUPREME COURT'S RULING ON RELIGIOUS MAGAZINE

(Including Excerpts From Ruling on Klan Cross Burning)

The New York Times
Copyright 1995 The New York Times Company
Friday, June 30, 1995

Following is an excerpt from the Supreme Court's 7-to-2 decision today that the Ku Klux Klan had a free-speech right to erect a cross in a state-owned park in Columbus, Ohio, that operated as a public forum, open to varieties of private expression. The dissenting Justices in the case, Capitol Square Review Board v. Pinette, were John Paul Stevens and Ruth Bader Ginsburg.

FROM THE DECISION

By Justice Scalia

Respondents' religious display in Capitol Square was private expression. Our precedent establishes that private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression. Indeed, in Anglo-American history, at least, government suppression of speech has so commonly been directed precisely at religious speech that a free-speech clause without religion would be "Hamlet" without the prince. Accordingly, we have not excluded from free-speech protections religious proselytizing, or even acts of worship. Petitioners do not dispute that respondents, in displaying their cross, were engaging in constitutionally protected expression. They do contend that the constitutional protection does not extend to the length of permitting that expression to be made on Capitol Square.

It is undeniable, of course, that speech which is constitutionally protected against state suppression is not thereby accorded a guaranteed forum on all property owned by the State. The right to use government property for one's private expression depends upon whether the property has by law or tradition been given the status of a public forum, or rather has been reserved for specific official uses. If the former, a State's right to limit protected expressive activity is sharply circumscribed: it may impose reasonable, content-neutral time, place and manner restrictions (a ban on all unattended displays, which did not exist here, might be one such), but it may regulate expressive content only if such a restriction is necessary, and narrowly drawn, to serve a compelling state interest. These strict standards apply here, since the District Court and the Court of Appeals found that Capitol Square was a traditional public forum. Petitioners do not claim that their denial of respondents' application was based upon a content-neutral time, place, or manner restriction. To the contrary, they concede indeed it is the essence of their case that the Board rejected the display precisely because its content was religious. Petitioners advance a single justification for closing Capitol Square to respondents' cross: the State's interest in avoiding official endorsement of Christianity, as required by the Establishment Clause. . . .

There is no doubt that compliance with the Establishment Clause is a state interest sufficiently compelling to justify content-based restrictions on speech. Whether that interest is implicated here, however, is a different question. And we do not write on a blank slate in answering it. We have twice previously addressed the combination of private religious expression, a forum available for public use, content-based regulation, and a State's interest in complying with the Establishment Clause. Both times, we have struck down the restriction on religious content.

Ronald W. ROSENBERGER, et al., Petitioners

v.

RECTOR AND VISITORS OF the UNIVERSITY OF VIRGINIA et al.

No. 94-329.

115 S.Ct. 2510

Argued March 1, 1995.

Decided June 29, 1995.

Justice KENNEDY delivered the opinion of the Court.

The University of Virginia, an instrumentality of the Commonwealth for which it is named and thus bound by the First and Fourteenth Amendments, authorizes the payment of outside contractors for the printing costs of a variety of student publications. It withheld any authorization for payments on behalf of petitioners for the sole reason that their student paper "primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality." That the paper did promote or manifest views within the defined exclusion seems plain enough. The challenge is to the University's regulation and its denial of authorization, the case raising issues under the Speech and Establishment Clauses of the First Amendment.

I

* * *

Petitioners' organization, Wide Awake Productions (WAP), qualified as a CIO [Contracted Independent Organization]. Formed by petitioner Ronald Rosenberger and other undergraduates in 1990, WAP was established "[t]o publish a magazine of philosophical and religious expression," "[t]o facilitate discussion which fosters an atmosphere of sensitivity to and tolerance of Christian viewpoints," and "[t]o provide a unifying focus for Christians of multicultural backgrounds." WAP publishes Wide Awake: A Christian Perspective at the University of Virginia. The paper's Christian viewpoint was evident from the first issue, in which its editors wrote that the journal "offers a Christian perspective on both personal and community issues, especially those relevant to college students at the University of Virginia." The editors committed the paper to a two-fold mission: "to challenge Christians to live, in word and deed, according to the faith they proclaim and to encourage students to consider what a personal relationship with Jesus Christ means." The first issue had articles about racism, crisis pregnancy, stress, prayer, C.S. Lewis' ideas about evil and free will, and reviews of religious music. In the next two issues, Wide Awake featured stories about homosexuality, Christian missionary work, and eating disorders, as well as music reviews and interviews with University professors. Each page of Wide Awake, and the end of each article or review, is marked by a cross. The advertisements carried in Wide Awake also reveal the Christian perspective of the journal. For the most part, the advertisers are churches, centers for Christian study, or Christian bookstores. By June 1992, WAP had distributed about 5,000 copies of Wide Awake to University students, free of charge.

WAP had acquired CIO status soon after it was organized. This is an important consideration in this case, for had it been a "religious organization," WAP would not have been accorded CIO status. As defined by the Guidelines, a "religious organization" is "an organization whose purpose is to practice a devotion to an acknowledged ultimate reality or deity." At no stage in this controversy has the University contended that WAP is such an organization.

A few months after being given CIO status, WAP requested the SAF [Student Activities Fund] to pay its printer $5,862 for the costs of printing its newspaper. The Appropriations Committee of the Student Council denied WAP's request on the ground that Wide Awake was a "religious activity" within the meaning of the Guidelines, i.e., that the newspaper "promote[d] or manifest[ed] a particular belie[f] in or about a deity or an ultimate reality." It made its determination after examining the first issue. WAP appealed the denial to the full Student Council, contending that WAP met all the applicable Guidelines and that denial of SAF support on the basis of the magazine's religious perspective violated the Constitution. The appeal was denied without further comment, and WAP appealed to the next level, the Student Activities Committee. In a letter signed by the Dean of Students, the committee sustained the denial of funding.

* * *

II

It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys. Other principles follow from this precept. In the realm of private speech or expression, government regulation may not favor one speaker over another. Discrimination against speech because of its message is presumed to be unconstitutional. These rules informed our determination that the government offends the First Amendment when it imposes financial burdens on certain speakers based on the

content of their expression. When the government targets not subject matter but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.

These principles provide the framework forbidding the State from exercising viewpoint discrimination, even when the limited public forum is one of its own creation. In a case involving a school district's provision of school facilities for private uses, we declared that "[t]here is no question that the District, like the private owner of property, may legally preserve the property under its control for the use to which it is dedicated." The necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for certain groups or for the discussion of certain topics. Once it has opened a limited forum, however, the State must respect the lawful boundaries it has itself set. The State may not exclude speech where its distinction is not "reasonable in light of the purpose served by the forum," nor may it discriminate against speech on the basis of its viewpoint. Thus, in determining whether the State is acting to preserve the limits of the forum it has created so that the exclusion of a class of speech is legitimate, we have observed a distinction between, on the one hand, content discrimination, which may be permissible if it preserves the purposes of that limited forum, and, on the other hand, viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations.

* * *

The University does acknowledge (as it must in light of our precedents) that "ideologically driven attempts to suppress a particular point of view are presumptively unconstitutional in funding, as in other contexts," but insists that this case does not present that issue because the Guidelines draw lines based on content, not viewpoint. As we have noted, discrimination against one set of views or ideas is but a subset or particular instance of the more general phenomenon of content discrimination. And, it must be acknowledged, the distinction is not a precise one. It is, in a sense, something of an understatement to speak of religious thought and discussion as just a viewpoint, as distinct from a comprehensive body of thought. The nature of our origins and destiny and their dependence upon the existence of a divine being have been subjects of philosophic inquiry throughout human history. We conclude, nonetheless, that here, as in Lamb's Chapel, viewpoint discrimination is the proper way to interpret the University's objections to Wide Awake. By the very terms of the SAF prohibition, the University does not exclude religion as a subject matter but selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints. Religion may be a vast area of inquiry, but it also provides, as it did here, a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered. The prohibited perspective, not the general subject matter, resulted in the refusal to make third-party payments, for the subjects discussed were otherwise within the approved category of publications.

* * *

The distinction between the University's own favored message and the private speech of students is evident in the case before us. The University itself has taken steps to ensure the distinction in the agreement each CIO must sign. The University declares that the student groups eligible for SAF support are not the University's agents, are not subject to its control, and are not its responsibility. Having offered to pay the third- party contractors on behalf of private speakers who convey their own messages, the University may not silence the expression of selected viewpoints.

The University urges that, from a constitutional standpoint, funding of speech differs from provision of access to facilities because money is scarce and physical facilities are not. Beyond the fact that in any given case this proposition might not be true as an empirical matter, the underlying premise that the University could discriminate based on viewpoint if demand for space exceeded its availability is wrong as well. The government cannot justify viewpoint discrimination among private speakers on the economic fact of scarcity. Had the meeting rooms in Lamb's Chapel been scarce, had the demand been greater than the supply, our decision would have been no different. It would have been incumbent on the State, of course, to ration or allocate the scarce resources on some acceptable neutral principle; but nothing in our decision indicated that scarcity would give the State the right to exercise viewpoint discrimination that is otherwise impermissible.

Vital First Amendment speech principles are at stake here. The first danger to liberty lies in granting the State the power to examine publications to determine whether or not they are based on some ultimate idea and if so for the State to classify them. The second, and corollary, danger is to speech from the chilling of individual thought and expression. That danger is especially real in the University setting, where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition. In ancient Athens, and, as Europe entered into a new period of intellectual awakening, in places like Bologna, Oxford, and Paris, universities began as voluntary and spontaneous assemblages or concourses for students to speak and to write and to learn. The quality and creative power of student intellectual life to this day remains a vital measure of a school's influence and attainment. For the University, by

regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the nation's intellectual life, its college and university campuses.

The Guideline invoked by the University to deny third-party contractor payments on behalf of WAP effects a sweeping restriction on student thought and student inquiry in the context of University sponsored publications. The prohibition on funding on behalf of publications that "primarily promot[e] or manifes[t] a particular belie[f] in or about a deity or an ultimate reality," in its ordinary and commonsense meaning, has a vast potential reach. The term "promotes" as used here would comprehend any writing advocating a philosophic position that rests upon a belief in a deity or ultimate reality. And the term "manifests" would bring within the scope of the prohibition any writing that is explicable as resting upon a premise which presupposes the existence of a deity or ultimate reality. Were the prohibition applied with much vigor at all, it would bar funding of essays by hypothetical student contributors named Plato, Spinoza, and Descartes. And if the regulation covers, as the University says it does, those student journalistic efforts which primarily manifest or promote a belief that there is no deity and no ultimate reality, then under-graduates named Karl Marx, Bertrand Russell, and Jean-Paul Sartre would likewise have some of their major essays excluded from student publications. If any manifestation of beliefs in first principles disqualifies the writing, as seems to be the case, it is indeed difficult to name renowned thinkers whose writings would be accepted, save perhaps for articles disclaiming all connection to their ultimate philosophy. Plato could contrive perhaps to submit an acceptable essay on making pasta or peanut butter cookies, provided he did not point out their (necessary) imperfections.

Based on the principles we have discussed, we hold that the regulation invoked to deny SAF support, both in its terms and in its application to these petitioners, is a denial of their right of free speech guaranteed by the First Amendment. It remains to be considered whether the violation following from the University's action is excused by the necessity of complying with the Constitution's prohibition against state establishment of religion. We turn to that question.

III

Before its brief on the merits in this Court, the University had argued at all stages of the litigation that inclusion of WAP's contractors in SAF funding authorization would violate the Establishment Clause. Indeed, that is the ground on which the University prevailed in the Court of Appeals. We granted certiorari on this question: "Whether the Establishment Clause compels a state university to exclude an otherwise eligible student publication from participation in the student activities fund, solely on the basis of its religious viewpoint, where such exclusion would violate the Speech and Press Clauses if the viewpoint of the publication were nonreligious."The University now seems to have abandoned this position, contending that "[t]he fundamental objection to petitioners' argument is not that it implicates the Establishment Clause but that it would defeat the ability of public education at all levels to control the use of public funds." That the University itself no longer presses the Establishment Clause claim is some indication that it lacks force; but as the Court of Appeals rested its judgment on the point and our dissenting colleagues would find it determinative, it must be addressed.

* * *

If there is to be assurance that the Establishment Clause retains its force in guarding against those governmental actions it was intended to prohibit, we must in each case inquire first into the purpose and object of the governmental action in question and then into the practical details of the program's operation. Before turning to these matters, however, we can set forth certain general principles that must bear upon our determination.

* * *

The governmental program here is neutral toward religion. There is no suggestion that the University created it to advance religion or adopted some ingenious device with the purpose of aiding a religious cause. The object of the SAF is to open a forum for speech and to support various student enterprises, including the publication of newspapers, in recognition of the diversity and creativity of student life. The University's SAF Guidelines have a separate classification for, and do not make third-party payments on behalf of, "religious organizations," which are those "whose purpose is to practice a devotion to an acknowledged ultimate reality or deity." The category of support here is for "student news, information, opinion, entertainment, or academic communications media groups," of which Wide Awake was 1 of 15 in the 1990 school year. WAP did not seek a subsidy because of its Christian editorial viewpoint; it sought funding as a student journal, which it was.

* * *

Government neutrality is apparent in the State's overall scheme in a further meaningful respect. The program respects the critical difference "between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." In this case, "the government has not willfully fostered or encouraged" any mistaken impression that the student newspapers speak for the University. The University has taken pains to disassociate itself from the private speech

involved in this case. The Court of Appeals' apparent concern that Wide Awake's religious orientation would be attributed to the University is not a plausible fear, and there is no real likelihood that the speech in question is being either endorsed or coerced by the State.

* * *

It does not violate the Establishment Clause for a public university to grant access to its facilities on a religion-neutral basis to a wide spectrum of student groups, including groups which use meeting rooms for sectarian activities, accompanied by some devotional exercises. This is so even where the upkeep, maintenance, and repair of the facilities attributed to those uses is paid from a student activities fund to which students are required to contribute. The government usually acts by spending money. Even the provision of a meeting room, as in Mergens and Widmar, involved governmental expenditure, if only in the form of electricity and heating or cooling costs. The error made by the Court of Appeals, as well as by the dissent, lies in focusing on the money that is undoubtedly expended by the government, rather than on the nature of the benefit received by the recipient. If the expenditure of governmental funds is prohibited whenever those funds pay for a service that is, pursuant to a religion-neutral program, used by a group for sectarian purposes, then Widmar, Mergens, and Lamb's Chapel would have to be overruled. Given our holdings in these cases, it follows that a public university may maintain its own computer facility and give student groups access to that facility, including the use of the printers, on a religion neutral, say first-come-first-served, basis. If a religious student organization obtained access on that religion-neutral basis and used a computer to compose or a printer or copy machine to print speech with a religious content or viewpoint, the State's action in providing the group with access would no more violate the Establishment Clause than would giving those groups access to an assembly hall. There is no difference in logic or principle, and no difference of constitutional significance, between a school using its funds to operate a facility to which students have access, and a school paying a third-party contractor to operate the facility on its behalf. The latter occurs here. The University provides printing services to a broad spectrum of student newspapers qualified as CIOs by reason of their officers and membership. Any benefit to religion is incidental to the government's provision of secular services for secular purposes on a religion-neutral basis. Printing is a routine, secular, and recurring attribute of student life.

By paying outside printers, the University in fact attains a further degree of separation from the student publication, for it avoids the duties of supervision, escapes the costs of upkeep, repair, and replacement attributable to student use, and has a clear record of costs. As a result, and as in Widmar, the University can charge the SAF, and not the taxpayers as a whole, for the discrete activity in question. It would be formalistic for us to say that the University must forfeit these advantages and provide the services itself in order to comply with the Establishment Clause. It is, of course, true that if the State pays a church's bills it is subsidizing it, and we must guard against this abuse. That is not a danger here, based on the considerations we have advanced and for the additional reason that the student publication is not a religious institution, at least in the usual sense of that term as used in our case law, and it is not a religious organization as used in the University's own regulations. It is instead a publication involved in a pure forum for the expression of ideas, ideas that would be both incomplete and chilled were the Constitution to be interpreted to require that state officials and courts scan the publication to ferret out views that principally manifest a belief in a divine being.

Were the dissent's view to become law, it would require the University, in order to avoid a constitutional violation, to scrutinize the content of student speech, lest the expression in question--speech otherwise protected by the Constitution--contain too great a religious content. The dissent, in fact, anticipates such censorship as "crucial" in distinguishing between "works characterized by the evangelism of Wide Awake and writing that merely happens to express views that a given religion might approve." That eventuality raises the specter of governmental censorship, to ensure that all student writings and publications meet some baseline standard of secular orthodoxy. To impose that standard on student speech at a university is to imperil the very sources of free speech and expression. . . .

To obey the Establishment Clause, it was not necessary for the University to deny eligibility to student publications because of their viewpoint. The neutrality commanded of the State by the separate Clauses of the First Amendment was compromised by the University's course of action. The viewpoint discrimination inherent in the University's regulation required public officials to scan and interpret student publications to discern their underlying philosophic assumptions respecting religious theory and belief. That course of action was a denial of the right of free speech and would risk fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires. There is no Establishment Clause violation in the University's honoring its duties under the Free Speech Clause.

The judgment of the Court of Appeals must be, and is, reversed.

It is so ordered.

Justice O'CONNOR, concurring.

* * *

This case lies at the intersection of the principle of government neutrality and the prohibition on state funding of religious activities. It is clear that the University has established a generally applicable program to encourage the free exchange of ideas by its students, an expressive marketplace that includes some 15 student publications with predictably divergent viewpoints. It is equally clear that petitioners' viewpoint is religious and that publication of Wide Awake is a religious activity, under both the University's regulation and a fair reading of our precedents. Not to finance Wide Awake, according to petitioners, violates the principle of neutrality by sending a message of hostility toward religion. To finance Wide Awake, argues the University, violates the prohibition on direct state funding of religious activities.

When two bedrock principles so conflict, understandably neither can provide the definitive answer. Reliance on categorical platitudes is unavailing. Resolution instead depends on the hard task of judging--sifting through the details and determining whether the challenged program offends the Establishment Clause. Such judgment requires courts to draw lines, sometimes quite fine, based on the particular facts of each case. As Justice Holmes observed in a different context: "Neither are we troubled by the question where to draw the line. That is the question in pretty much everything worth arguing in the law. Day and night, youth and age are only types."

* * *

So it is in this case. The nature of the dispute does not admit of categorical answers, nor should any be inferred from the Court's decision today. Instead, certain considerations specific to the program at issue lead me to conclude that by providing the same assistance to Wide Awake that it does to other publications, the University would not be endorsing the magazine's religious perspective.

First, the student organizations, at the University's insistence, remain strictly independent of the University. . . .

Second, financial assistance is distributed in a manner that ensures its use only for permissible purposes. A student organization seeking assistance must submit disbursement requests; if approved, the funds are paid directly to the third-party vendor and do not pass through the organization's coffers. This safeguard accompanying the University's financial assistance, when provided to a publication with a religious viewpoint such as Wide Awake, ensures that the funds are used only to further the University's purpose in maintaining a free and robust marketplace of ideas, from whatever perspective. This feature also makes this case analogous to a school providing equal access to a generally available printing press (or other physical facilities), and unlike a block grant to religious organizations.

Third, assistance is provided to the religious publication in a context that makes improbable any perception of government endorsement of the religious message. Wide Awake does not exist in a vacuum. It competes with 15 other magazines and newspapers for advertising and readership. The widely divergent viewpoints of these many purveyors of opinion, all supported on an equal basis by the University, significantly diminishes the danger that the message of any one publication is perceived as endorsed by the University. Besides the general news publications, for example, the University has provided support to The Yellow Journal, a humor magazine that has targeted Christianity as a subject of satire, and Al-Salam, a publication to "promote a better understanding of Islam to the University Community." Given this wide array of non-religious, anti-religious and competing religious viewpoints in the forum supported by the University, any perception that the University endorses one particular viewpoint would be illogical. This is not the harder case where religious speech threatens to dominate the forum.

Finally, although the question is not presented here, I note the possibility that the student fee is susceptible to a Free Speech Clause challenge by an objecting student that she should not be compelled to pay for speech with which she disagrees. There currently exists a split in the lower courts as to whether such a challenge would be successful. While the Court does not resolve the question here, the existence of such an opt-out possibility not available to citizens generally, provides a potential basis for distinguishing proceeds of the student fees in this case from proceeds of the general assessments in support of religion that lie at the core of the prohibition against religious funding, and from government funds generally. Unlike monies dispensed from state or federal treasuries, the Student Activities Fund is collected from students who themselves administer the fund and select qualifying recipients only from among those who originally paid the fee. The government neither pays into nor draws from this common pool, and a fee of this sort appears conducive to granting individual students proportional refunds. The Student Activities Fund, then, represents not government resources, whether derived from tax revenue, sales of assets, or otherwise, but a fund that simply belongs to the students.

The Court's decision today therefore neither trumpets the supremacy of the neutrality principle nor signals the demise of the funding prohibition in Establishment Clause jurisprudence. As I observed last Term, "[e]xperience proves that the Establishment Clause, like the Free Speech Clause, cannot easily be reduced to a single test." When bedrock principles collide, they test the limits of categorical obstinacy and expose the flaws and dangers of a Grand Unified Theory that may turn out to be neither grand nor unified. The Court today does only what courts must do in many Establishment Clause cases--focus on

specific features of a particular government action to ensure that it does not violate the Constitution. By withholding from Wide Awake assistance that the University provides generally to all other student publications, the University has discriminated on the basis of the magazine's religious viewpoint in violation of the Free Speech Clause. And particular features of the University's program--such as the explicit disclaimer, the disbursement of funds directly to third-party vendors, the vigorous nature of the forum at issue, and the possibility for objecting students to opt out--convince me that providing such assistance in this case would not carry the danger of impermissible use of public funds to endorse Wide Awake's religious message.

Subject to these comments, I join the opinion of the Court.

Justice THOMAS concurring. [Omitted]

Justice SOUTER, with whom Justice STEVENS, Justice GINSBURG and Justice BREYER join, dissenting.

The Court today, for the first time, approves direct funding of core religious activities by an arm of the State. It does so, however, only after erroneous treatment of some familiar principles of law implementing the First Amendment's Establishment and Speech Clauses, and by viewing the very funds in question as beyond the reach of the Establishment Clause's funding restrictions as such. Because there is no warrant for distinguishing among public funding sources for purposes of applying the First Amendment's prohibition of religious establishment, I would hold that the University's refusal to support petitioners' religious activities is compelled by the Establishment Clause. I would therefore affirm.

I

The central question in this case is whether a grant from the Student Activities Fund to pay Wide Awake's printing expenses would violate the Establishment Clause. Although the Court does not dwell on the details of Wide Awake's message, it recognizes something sufficiently religious in the publication to demand Establishment Clause scrutiny. Although the Court places great stress on the eligibility of secular as well as religious activities for grants from the Student Activities Fund, it recognizes that such evenhanded availability is not by itself enough to satisfy constitutional requirements for any aid scheme that results in a benefit to religion. Something more is necessary to justify any religious aid. Some members of the Court, at least, may think the funding permissible on a view that it is indirect, since the money goes to Wide Awake's printer, not through Wide Awake's own checking account. The Court's principal reliance, however, is on an argument that providing religion with economically valuable services is permissible on the theory that services are economically indistinguishable from religious access to governmental speech forums, which sometimes is permissible. But this reasoning would commit the Court to approving direct religious aid beyond anything justifiable for the sake of access to speaking forums. The Court implicitly recognizes this in its further attempt to circumvent the clear bar to direct governmental aid to religion. Different members of the Court seek to avoid this bar in different ways. The opinion of the Court makes the novel assumption that only direct aid financed with tax revenue is barred, and draws the erroneous conclusion that the involuntary Student Activities Fee is not a tax. I do not read Justice O'CONNOR'S opinion as sharing that assumption; she places this Student Activities Fund in a category of student funding enterprises from which religious activities in public universities may benefit, so long as there is no consequent endorsement of religion. The resulting decision is in unmistakable tension with the accepted law that the Court continues to avow.

A

* * *

Using public funds for the direct subsidization of preaching the word is categorically forbidden under the Establishment Clause, and if the Clause was meant to accomplish nothing else, it was meant to bar this use of public money. Evidence on the subject antedates even the Bill of Rights itself, as may be seen in the writings of Madison, whose authority on questions about the meaning of the Establishment Clause is well settled. Four years before the First Congress proposed the First Amendment, Madison gave his opinion on the legitimacy of using public funds for religious purposes, in the Memorial and Remonstrance Against Religious Assessments, which played the central role in ensuring the defeat of the Virginia tax assessment bill in 1786 and framed the debate upon which the Religion Clauses stand: "Who does not see that . . . the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?"

* * *

The principle against direct funding with public money is patently violated by the contested use of today's student activity fee. Like today's taxes generally, the fee is Madison's threepence. The University exercises the power of the State to compel a student to pay it, see Jefferson's Preamble, supra, and the use of any part of it for the direct support of religious activity thus strikes at what we have repeatedly held to be the heart of the prohibition on establishment.

The Court, accordingly, has never before upheld direct state funding of the sort of proselytizing published in Wide Awake and, in fact, has categorically condemned state programs directly aiding religious activity.

Even when the Court has upheld aid to an institution performing both secular and sectarian functions, it has always made a searching enquiry to ensure that the institution kept the secular activities separate from its sectarian ones, with any direct aid flowing only to the former and never the latter.

Reasonable minds may differ over whether the Court reached the correct result in each of these cases, but their common principle has never been questioned or repudiated. "Although Establishment Clause jurisprudence is characterized by few absolutes, the Clause does absolutely prohibit government-financed . . . indoctrination into the beliefs of a particular religious faith."

B

* * *

The Court's claim of support from these forum-access cases is ruled out by the very scope of their holdings. While they do indeed allow a limited benefit to religious speakers, they rest on the recognition that all speakers are entitled to use the street corner (even though the State paves the roads and provides police protection to everyone on the street) and on the analogy between the public street corner and open classroom space. Thus, the Court found it significant that the classroom speakers would engage in traditional speech activities in these forums, too, even though the rooms (like street corners) require some incidental state spending to maintain them. The analogy breaks down entirely, however, if the cases are read more broadly than the Court wrote them, to cover more than forums for literal speaking. There is no traditional street corner printing provided by the government on equal terms to all comers, and the forum cases cannot be lifted to a higher plane of generalization without admitting that new economic benefits are being extended directly to religion in clear violation of the principle barring direct aid. The argument from economic equivalence thus breaks down on recognizing that the direct state aid it would support is not mitigated by the street corner analogy in the service of free speech. Absent that, the rule against direct aid stands as a bar to printing services as well as printers.

* * *

The issue whether a distinction is based on viewpoint does not turn simply on whether a government regulation happens to be applied to a speaker who seeks to advance a particular viewpoint; the issue, of course, turns on whether the burden on speech is explained by reference to viewpoint. As when deciding whether a speech restriction is content-based or content-neutral, "[t]he government's purpose is the controlling consideration." So, for example, a city that enforces its excessive noise ordinance by pulling the plug on a rock band using a forbidden amplification system is not guilty of viewpoint discrimination simply because the band wishes to use that equipment to espouse antiracist views. Nor does a municipality's decision to prohibit political advertising on bus placards amount to viewpoint discrimination when in the course of applying this policy it denies space to a person who wishes to speak in favor of a particular political candidate.

Accordingly, the prohibition on viewpoint discrimination serves that important purpose of the Free Speech Clause, which is to bar the government from skewing public debate. Other things being equal, viewpoint discrimination occurs when government allows one message while prohibiting the messages of those who can reasonably be expected to respond. It is precisely this element of taking sides in a public debate that identifies viewpoint discrimination and makes it the most pernicious of all distinctions based on content. Thus, if government assists those espousing one point of view, neutrality requires it to assist those espousing opposing points of view, as well.

There is no viewpoint discrimination in the University's application of its Guidelines to deny funding to Wide Awake. Under those Guidelines, a "religious activit[y]," which is not eligible for funding is "an activity which primarily promotes or manifests a particular belief(s) in or about a deity or an ultimate reality." It is clear that this is the basis on which Wide Awake Productions was denied funding. The discussion of Wide Awake's content shows beyond any question that it "primarily promotes or manifests a particular belief(s) in or about a deity . . .," in the very specific sense that its manifest function is to call students to repentance, to commitment to Jesus Christ, and to particular moral action because of its Christian character.

* * *

The Guidelines are thus substantially different from the access restriction considered in Lamb's Chapel, the case upon which the Court heavily relies in finding a viewpoint distinction here. Lamb's Chapel addressed a school board's regulation prohibiting the after-hours use of school premises "by any group for religious purposes," even though the forum otherwise was open for a variety of social, civic, and recreational purposes. "Religious" was understood to refer to the viewpoint of a believer, and the regulation did not purport to deny access to any speaker wishing to express a non-religious or expressly antireligious point of view on any subject.

With this understanding, it was unremarkable that in Lamb's Chapel we unanimously determined that the access restriction, as applied to a speaker wishing to discuss family values from a Christian perspective,

impermissibly distinguished between speakers on the basis of viewpoint. Equally obvious is the distinction between that case and this one, where the regulation is being applied, not to deny funding for those who discuss issues in general from a religious viewpoint, but to those engaged in promoting or opposing religious conversion and religious observances as such. If this amounts to viewpoint discrimination, the Court has all but eviscerated the line between viewpoint and content.

To put the point another way, the Court's decision equating a categorical exclusion of both sides of the religious debate with viewpoint discrimination suggests the Court has concluded that primarily religious and antireligious speech, grouped together, always provides an opposing (and not merely a related) viewpoint to any speech about any secular topic. Thus, the Court's reasoning requires a university that funds private publications about any primarily nonreligious topic also to fund publications primarily espousing adherence to or rejection of religion. But a university's decision to fund a magazine about racism, and not to fund publications aimed at urging repentance before God does not skew the debate either about racism or the desirability of religious conversion. The Court's contrary holding amounts to a significant reformulation of our viewpoint discrimination precedents and will significantly expand access to limited-access forums.

III

Since I cannot see the future I cannot tell whether today's decision portends much more than making a shambles out of student activity fees in public colleges. Still, my apprehension is whetted by Chief Justice Burger's warning in Lemon v. Kurtzman: "in constitutional adjudication some steps, which when taken were thought to approach 'the verge,' have become the platform for yet further steps. A certain momentum develops in constitutional theory and it can be a 'downhill thrust' easily set in motion but difficult to retard or stop."

I respectfully dissent.

RELIGIOUS FREE SPEECH
Some Colleges May Choose to Stop Funding All Activities

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Philip Walzer, Esther Diskin
Staff Writers

Justice Anthony M. Kennedy, in the majority opinion, said U.Va. created "a sweeping restriction on student thought and student inquiry" that "would risk fostering a pervasive bias or hostility to religion."

Some religious groups hailed the ruling, together with another decision Thursday permitting the Ku Klux Klan to erect a cross at an Ohio park, for expanding opportunities for public expressions of faith.

"We have crossed a critical threshold in the fight for religious liberty," said Jay Sekulow, chief counsel for the American Center for Law and Justice in Virginia Beach, which had filed briefs supporting both the student magazine and the KKK. "The message is clear: Religious speech or speakers must be treated exactly the same way as any other group."

The center is a nonprofit legal group established by Pat Robertson.

But Barry W. Lynn, executive director of Americans United for the Separation of Church and State, said the ruling amounts to government support of religion: "When you have a public university picking the pockets of some students to pay for the evangelizing of other students, that's not free speech. That's tyranny."

Sekulow said the U.Va. decision will "propel and energize other religious liberty issues," such as the fight for government vouchers for religious schools.

But other legal experts said it would have little effect on the voucher issue, because the student fees that raise money for student activities are not comparable to taxes, which would subsidize the vouchers. And, they said, courts might allow students who don't agree with a campus group to simply withhold some student fees, an option that isn't open to taxpayers.

Most colleges, which have guidelines similar to U.Va.'s, will be forced to change their rules for collecting and distributing money to student organizations, opening the door to demands from many more groups, university officials said.

As a result, critics say, many student activities could get shortchanged if too many groups claim a piece of the pie. Or, even worse, colleges could drop all funding of student organizations to avoid the headache, they say.

"It has to do with budgets; it has nothing to do with religion," said Sheldon Steinbach, general counsel for the American Council on Education, a college lobbying group in Washington that backed U.Va. "There just isn't enough money."

For Ron Rosenberger, the student who took the case to the Supreme Court, religion was the point.

He established the magazine "Wide Awake" in 1990 to enlighten a campus that he considered to be dominated by secular and liberal viewpoints. The magazine looked at issues ranging from racism to eating disorders through a Christian lens.

In 1991, he applied for $5,862 in university funds but was turned down because the magazine was deemed a "religious activity." U.Va. bars funding to political and religious groups, fraternities or sororities.

The magazine closed for lack of money. Rosenberger left campus in 1992 without completing his degree, but he continued his fight in the courts. This year, U.Va. students resurrected the magazine without aid from the university.

Debate has mostly hinged on dueling interpretations of the "establishment clause" of the First Amendment, which prohibits Congress from making laws "respecting an establishment of religion, or prohibiting the free exercise thereof."

Supporters of Rosenberger said the university squelched his right to express his religious views. Opponents, including U.Va., said a public college could not give money to a religious group without appearing to endorse that faith.

But the majority of justices dismissed the university's interpretation of the First Amendment. "To obey the establishment clause," Kennedy wrote, "it was not necessary for the university to deny eligibility to student publications because of their viewpoint."

Joining him were Chief Justice William H. Rehnquist and Justices Sandra Day O'Connor, Antonin Scalia and Clarence Thomas. The dissenters were Justices Stephen G. Breyer, Ruth Bader Ginsburg, David H. Souter and John Paul Stevens.

Souter, in his dissent, wrote: "The court today, for the first time, approves direct funding of core religious activities by an arm of the state."

Souter, who cited numerous excerpts from the magazine, said it amounted to sermons on salvation. "Using public funds for the direct subsidization of preaching the word is categorically forbidden under the Establishment Clause," he wrote.

U.Va.'s president, John T. Casteen III, said Thursday, "I think there's probably some disappointment around here because a lot of people think the court misapplied the law."

Casteen said the Board of Visitors would meet in the fall to revise the funding guidelines. Board members could elect to do anything from distributing money to every student organization to shutting down funding for all groups, though Casteen said he doubted they would pursue that option.

Officials at Old Dominion University and the College of William and Mary say they, too, will rewrite their guidelines. Under their current rules, they said, a publication such as "Wide Awake" would not have been funded.

Elliot Mincberg, legal director of the People for the American Way, said the ruling will create an "anything goes" attitude toward funding student organizations, whether they're the KKK or a sorority. "These funds may be something that universities become leery of in the future, because it will create a lot of conflict."

But Michael McDonald, president of the Center for Individual Rights, which represented Rosenberger, said he doubted schools would drop funding for activities altogether. "To deny benefits to everyone," he said, "is, to me, cutting off your nose to spite your face."

Thomas Jefferson, who founded the university, has been invoked by both sides throughout the case, and Thursday was no different. Souter quoted Jefferson in his dissent, and other university supporters agreed with his reasoning.

"The whole idea behind Jefferson's Bill for the Establishment of Religious Freedom and the First Amendment is that religion should be strictly voluntary, so people don't pay a mandatory fee to support . . . religion at all," said Melissa Rogers, associate general counsel for the Baptist Joint Committee, a coalition of moderate Baptist conferences that backed the university.

However, Jim Gilmore, the state attorney general, declared: "Thomas Jefferson founded the University of Virginia as a monument to vigorous debate and the robust exchange of ideas. The University of Virginia may now continue in that historic role." Though Gilmore's office usually represents state-supported colleges, he sided with Rosenberger in the case.

In Charlottesville, many students said they knew little about the case. Julie Lichtenvoort, a graduate student in psychology, said, "I'm just worried that a trend will start that U.Va. will become predominantly very religious."

But Joanna Steere, entering her senior year, said: "I don't have a problem with it. All voices should have an outlet."

Campus correspondent Jack Mazzeo contributed to this story.

INTERVIEW
Ralph Reed of the Christian Coalition, and George Stephanopoulos, Adviser to the President On School Prayer and the First Amendment

Meet the Press

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MR. RUSSERT: And with us now, Ralph Reed and George Stephanopoulos. Gentlemen, welcome.

* * *

MR. RUSSERT: One of the most important areas is something called a religious equality amendment, which, as I read it, would allow for prayer at graduation exercises or athletic events, a creche or menorah in town squares. How would you bring that result about?

MR. REED: Well, I think what we want to do, Tim, is obviously move through the legislative process. I was on a conference call just a couple of weeks ago with chairman of the House Judiciary Committee, Henry Hyde. We know that we need to have hearings on this, we need to hear from both sides. I think what we're trying to redress is a systematic marginalization of faith in the public square. It's the kind of thing that Yale Law Professor Stephen Carter talked about so eloquently in his book, "The Culture of Disbelief."

We don't want to really go back to a day where any child of any faith is required to say a prayer with which they disagree that's been mandated by the government. But if a group of high school seniors, who are, after all, many of them, old enough to vote and old enough to be drafted, if they decide that they want to have a rabbi come in and give a non-sectarian invocation at their high school graduation ceremony, we don't believe that anyone should silence or bludgeon those students into submission.

As the Supreme Court itself said in the Supreme Court decision of Demoyne vs. Tinker School District, a child does not lose or shed their First Amendment right to freedom of expression when they enter the school house gate. We also believe that this goes way beyond voluntary school prayer. It goes to whether or not the Ten Commandments can be posted in a public building and so forth. We think an amendment or a statute, preferably an amendment, will help rectify what we think is 30 years of hostility towards faith in the public square.

MR. RUSSERT: Now this would be a constitutional amendment to the Constitution which would help interpret the First Amendment?

MR. REED: No, it doesn't amend the First Amendment. What it does is it overturns a Supreme Court decision called Lemon vs. Kurtzman. And in that decision in 1971, the Supreme Court established a three-part test to determine whether or not an act by the government violated the Establishment Clause of the Constitution. The problem is that that three-part test really makes no sense. It's confusing, it's been applied in a very chaotic and inconsistent way. And as Justice Antonin Scalia wrote in a dissent in the Lee vs. Weisman decision in 1992, he said that the Lemon test is really like a ghoul from a late-night movie that continues to rise from the dead even after being stabbed, and it has been applied in a way that we think is unfair.

For example, you can--a public facility can loan a projection--a projector--a movie projector to a private or parochial school, but it can't loan the films. It can't loan textbooks, but it can loan buses that then take those students to a public library. It doesn't really make any sense. What we really want is something very simple. We don't want government edicts, we don't want government legislating religion, but if a citizen or a student through private initiated speech wants to make a religious statement, we don't think they should be silenced.

MR. RUSSERT: You'll have public school teachers and supervisors standing up and leading religious activity, and that's the very thing that the United States of America was supposed to be established to avoid.

MR. REED: Well, that's just simply not true, and I'm not sure how many of those people read the document. We, in fact, make it very clear that we are opposed to government-dictated prayer in compulsory settings. But as I said, if you go back to the Lee vs. Weisman decision where the Supreme Court said that a rabbi invited in by the students couldn't give a prayer at a high school graduation, even though we open every day of Congress with prayer, even though we open every session of the Supreme Court with prayer, even though the Ten Commandments are chiseled in marble over the heads of the Supreme Court justices and President Clinton himself in a town hall meeting in Charlotte, North Carolina, in April of

last year, said that he disagreed with that statement and he thinks prayer ought to be allowed as well. So I'm hopeful that we can find something that will secure the rights of the American people to the freedom of speech without regard to its content while at the same time avoiding what we all oppose, which is a government edict or a government church.

MR. RUSSERT: If a group of students are praying a Christian prayer. . .what should the Jewish or Muslim students in class do at that particular time?

MR. REED: Well, I think they have a number of options. They could do what I would do, if it were a rabbi giving a Jewish prayer or a Muslim cleric giving a Muslim prayer. What I would do is bow my head out of respect for the religious beliefs of that individual. It's the same thing I do, Tim, when I pick up the newspaper and I read something that I don't agree with. I don't try to take away the right of that newspaper to print that story, because it's their right under the First Amendment. I do have a right to state my disagreement with that view, and they would be free to do that. They would also be free not attend the non-compulsory event at which that takes place.

Again, as President Clinton, himself, said in referencing high school graduations, he said no one is required to come to an event like that. And I think what we ought to do--what we want to avoid really, very simply, is what happened in the Engel vs. Vitale and Schemp vs. Abington School District cases where you had the New York State School Board write a prayer. This was a government prayer. Teachers read that prayer and every student had to listen to it. We're not advocating that. But if a group of students says, "We'd like to have prayer," we don't think they should be denied that right. We think it's their right under the Constitution.

MR. RUSSERT: Mr. Stephanopoulos, would the administration support such a constitutional amendment?

MR. STEPHANOPOULOS: I don't think so, Tim, because you can't tell what the unintended consequences of a constitutional amendment are. Let's go back to first principles. As you pointed out, the First Amendment has protected religion in this country for over 200 years. We've become one of the most religious countries in the world with great diversity and great religious faith because the First Amendment devised by Thomas Jefferson protected religion and protected the state. It kept the spheres separate. We're not trying to keep religion out of public life. As Ralph has said, the president believes that people of religious faith have a right and a responsibility to make their views known, and he does agree. He sees no problem with having religious prayers at certain graduation ceremonies.

The problem with a constitutional amendment is that it would probably strike the wrong balance, and there would be no way to prevent a broader reach. For example, the problem with the classroom: What we want to avoid more than anything else is coercion of conscience in the classroom. If a student got up and prayed while all the other students there are sitting there, there is an element of coercion, and that's what we have to avoid time and time again.

MR. RUSSERT: But President Clinton in Charlotte, as Mr. Reed pointed out, said--let me quote this. He said, "You can't have a prayer at the graduation exercise. I don't agree with that, because if you're praying at a graduation exercise or a sporting event, it's a big open-air thing. People should be able to freely pray and to acknowledge God. We have chaplains in the House and Senate."

If you don't want a constitutional amendment, then how do you address the Supreme Court's--or how do you overturn the Supreme Court's decision--would say that the kind of thing the president wants to be allowed--praying at graduations and sporting events and is not now allowed--how do you fix it?

MR. STEPHANOPOULOS: Well, right now there are conflicting decisions in the courts about this, so the courts still have a ways to go on whether or not it ultimately will be allowed, particularly in student-led prayers, which is what Ralph is talking about. In addition, the president has already taken steps to make sure that the bar against religious expression in public life is lowered. The Religious Freedom Restoration Act, which he signed and was supported by religious groups from across the political spectrum a year and a half ago, makes clear that we want to allow religion, people of religious faith to make their views known.

What we also have to do, I think, is make very, very clear what is already allowed under the law. You know, there's an awful lot of confusion across the country about what is and what isn't allowed in school districts. For example, most people don't know that students are allowed to pray in cafeterias. There is absolutely nothing to prevent students from getting together in groups and praying. There's nothing to prevent a student from expressing his religious views in class. There's nothing to prevent students from gathering before school starts out at the flagpole and having prayer. And we are trying right now to make sure that every school district and every principal knows what is currently allowed under the law so that people aren't acting under a misconception about what is in the law.

In fact, what I would say before you go to the extraordinary step of overturning the First Amendment, which has really protected religion for so long in this country, we would invite the Christian Coalition to join the Clinton administration and other religious groups from across the country in a national campaign to make sure that every school principal, every teacher, every school superintendent knows exactly what is permitted under the law right now.

MR. RUSSERT: So we're clear, President Clinton would be in favor of a prayer at a graduation exercise at a public school, a prayer at a sporting event at a public university, and he would be in favor of a manger scene in a town public square?

MR. STEPHANOPOULOS: The president has said that you can do that. In current--in some places right now, you can have manger scenes and secular demonstrations of some sort. The president has publicly said he's for that. What he is against is amending the Constitution. We cannot upset the balance struck in the First Amendment.

MR. RUSSERT: Mr. Reed, do you want to respond?

MR. REED: Well, I think--first of all, I welcome the words, but the words have really got to be backed by action, and the reality is that there is no ambiguity whatsoever about the right of a rabbi or a priest or a pastor to offer prayer at a high school graduation ceremony. The Supreme Court has ruled that that is unconstitutional. The only way to overturn that is to either limit the jurisdiction of the courts, which has never been done before on a First Amendment issue and we would be against, or amending the Constitution or passing some kind of a statute.

The second thing is, Tim, this goes way beyond school prayer. This goes to the issue of the centrality of faith in the social fabric. The Supreme Court has also ruled that you can't post the Ten Commandments in a public building, either a courthouse, a school, anywhere. The Supreme Court has also ruled that a school district that corresponds to the boundaries of a largely Jewish community in--outside of New York, the Kiryas Joel School District, is unconstitutional ipso facto because it's a religious neighborhood.

What we're talking about here is not just school prayer. We're talking about the rights of the American people to express the faith that springs out of their hearts and which is the vital part of our social fabric. And I--although I agree with George, the Religious Freedom Restoration Act was a good step; it's a baby step. We've got to now take a giant leap forward and guarantee the First Amendment rights of every citizen.

MR. RUSSERT: I'll give you the last word, Mr. Stephanopoulos.

MR. STEPHANOPOULOS: Again, the problem when--once you move into the Constitution, you upset the balance that has protected religion in this country for so long. There's an Equal Access Act, which guarantees that students and teachers also have the right to express their views in the public square. We have the protections right now. When you go in, when you open up the Constitution, you're going to cross the line from allowing free expression, from protecting religion into coercion of conscience.

* * *

MS. IFILL:But here's my question. We're also involved in politics in varying degrees. Is religion bad for politics or is politics bad for religion?

MR. STEPHANOPOULOS: Oh, I think that people of faith have to be involved in politics, that people have a responsibility to go out and express those views. What you have to make sure of, is that when you do that, you also make room for everyone of differing views to express those same opinions.

MR. REED: I agree with that. I think that Martin Luther King probably said it best in 1954 when he said that "a just law is a law; a man-made law, that corresponds with the law of God and with the law of nature." And I think what people of faith bring, Gwen, to the debate is not something that is dangerous, it's not intolerant, it's what has always made our nation great. It's people trying to give something to government rather than get something to government.

In this city, we've got an awful lot of lobbyists in this town that are looking for tax breaks for corporations, we've got unions looking for special interest outlooks and so forth. People of faith, uniquely, are not looking for anything for themselves, they're looking for something that will enliven and strengthen the culture and strengthen the family for everybody and I think for that reason, they ought to be welcome to the process, and not excluded.

MS. IFILL: Why is there so much nervousness about the idea that they would be comingling of politics and religion.

MR. STEPHANOPOULOS: Because in the end, what you have to be worried about is that when it's too closely mingled with any purely partisan political agenda, it's bad for the church, it's bad for people of faith and it's bad for the polity. And that's what we have to avoid. It tends to corrupt both the people involved and the government when you get too closely tied. The role of the church is to go out and enunciate principles, to follow guideposts, to make sure that their views are expressed. The problem is when you get involved in the messy day-to-day compromises. For instance, with the contract, you end up supporting things you're against. Ralph--I believe it when he says he's against abortion; he supported a contract that will help promote it. That's a real problem. That's the problem with the compromise.

MR. RUSSERT: Let me just close on this one point. Mr. Reed, when you took the job as the executive director of the coalition, you said something that very much struck me. You said, "I honestly believe that, in my lifetime, we will see a country once again governed by Christians." Do you think that President Clinton is a Christian leader?

MR. REED: Well, first of all, I don't think I actually made that statement. That remark has been attributed to me. What I want is to see people of faith be able to serve in government and not excluded.

You know, Tim, I've never felt it was my role to sit in judgment of the personal faith commitments of elected officials, or any other person, for that matter. President Clinton's relationship with God is between he and his maker, and it's appropriate not for me or anybody else to sit in judgment of it. I think to the extent that we have a dispute with this administration, it is really based on policy. This is an administration that ran promising a tax cut for middle-class families with children. And now not only has it not fulfilled on that pledge, but it is attacking those who are trying to fulfill it. This is an administration that ran promising to be a new kind of Democrat, and instead we got gays in the military and Joycelyn Elders. So the dispute is about policy. With regard to people's personal faith commitments, I've never felt that should be on the table. It's not an appropriate topic for public discourse.

* * *

MR. RUSSERT: Do you think the president is espousing Christian values in policy?

MR. REED: Well, I think, as I guess he said when he was running for president, I think there is always a danger of the bully pulpit being turned into a pulpit of bull. I think there is a point at which you can talk about things, and I applaud him for talking about them. He gave a very eloquent speech yesterday at the conference on character building, about the need for moral values. I think the issue is, is that that rhetoric and that talk needs to be backed up with actions.

* * *

MR. STEPHANOPOULOS: Please, two points. Number one, on tax credit for families with children. The president passed a tax cut for 15 million families with children in his bill. The Republican contract would overturn that tax cut and raise taxes. Number two, I'm glad to hear Ralph talk about judge not lest ye be judged. In his book, he suggests, somehow, that President Clinton's faith is insincere. And if you would take the opportunity to retract that statement now, I think it would be good for everyone.

MR. REED: I didn't suggest that. It's not true. I've never questioned the sincerity of his faith commitment or any of the politicians. Let me make. . .

MR. RUSSERT: I have to leave it there.

MR. REED: OK.

MR. RUSSERT: I'm sorry. Mr. Reed, Mr. Stephanopoulos, thank you for a very interesting morning. We hope you'll come back.

MR. REED: Thank you.

MR. STEPHANOPOULOS: Thank you.

MR. RUSSERT: And we'll be right back with William Safire.

WHEN FAITH AND WORK COLLIDE
Defining Standards for Religious Harassment in the Workplace

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Dean J. Schaner, Melissa M. Erlemeier

From coverage of the Anita Hill-Clarence Thomas hearings to the movie Disclosure, the press and popular culture have given extraordinary attention to sexual harassment in the workplace. Other forms of workplace harassment, however, are often overlooked, including religious harassment. That changed in October 1993. The EEOC proposed consolidated guidelines covering workplace harassment based on race, color, religion, gender, national origin, age, and disability. The guidelines created a public uproar. Religious conservatives harshly attacked the guidelines, reasoning that the harassment standards, as applied to religion, would force employers to create a religion-free zone to avoid liability. Liberal groups criticized the vague terminology in the guidelines, expressing concern that the proposed harassment standards would restrict religious free expression in the workplace. Bowing to substantial political pressure, the EEOC withdrew the guidelines and does not plan to revise them. This article discusses religious expression in the workplace and the public outcry over the EEOC's proposed guidelines, analyzes several cases interpreting religious discrimination and harassment, and contends that the standards applied to religious harassment should mirror the standards applied by the courts in sexual harassment cases.

Tom works as an associate in the trust department of a small bank. Based on his Christian-fundamentalist upbringing, he believes that the only way to obtain eternal life is through self-denial and faith in Jesus Christ as his personal savior. When Tom began work with the bank in 1990, he did not believe that it was appropriate to proselytize to his coworkers about his religious beliefs. Things changed in 1994. Tom participated in several local political elections, and his pastor advised him that increased political action was necessary to promote Christian religious values in an amoral, secular society. In his quest to spread his fundamentalist Christian beliefs, Tom told Dennis, a Jewish coworker, that to obtain eternal life Dennis must convert to Christianity and believe in Jesus Christ as his personal savior. Initially, Dennis was not offended, but Tom continued to discuss his Christian beliefs with Dennis. Tom also placed numerous religious objects on his desk, including a Bible, a large picture of Jesus Christ, and a plaque containing the phrase, "Jesus is the only way to eternal life."

Dennis listened to Tom proselytize about his Christian beliefs for three weeks. When Tom continued to preach at work, Dennis became offended by Tom's discussions and the open display of religious paraphernalia at Tom's desk. Dennis told Tom that he was offended by the religious comments and wanted it to stop. Tom did not stop. He believed that Dennis was misinformed and tried to explain to Dennis that Jesus Christ was the true savior. Because Tom did not quit preaching, Dennis called the bank's human resources department and reported that Tom's religious conversations and objects offended him.

In view of these facts, the bank is faced with several choices: (1) apply the bank's sexual harassment policy and conduct an investigation to determine whether Tom's conduct was sufficiently severe or pervasive to create an abusive working environment; (2) do nothing and inform Dennis that Tom has a right to freely voice his religious beliefs in the workplace; (3) transfer Tom or Dennis to a different department; or (4) explain to Tom and Dennis that the bank is a religion-free zone and will not tolerate any religious discussions during work time, nor the display of any religious objects in the workplace. Unfortunately, neither Title VII of the Civil Rights Act of 1964 nor the Equal Employment Opportunity Commission (EEOC) offers the bank any significant guidance concerning the conflict between Tom's desire to express his religious beliefs and Dennis's desire that Tom stop espousing his beliefs in the workplace.

Recently, the EEOC made an attempt to offer guidance concerning workplace harassment, but failed. On October 1, 1993, the Commission proposed consolidated guidelines concerning unlawful harassment in the workplace, including religious harassment. The EEOC purported to apply the existing guidelines for sex and national origin harassment to other forms of harassment, such as race, religion, age, and disability. However, the Commission's proposed standards for restricting harassment in the workplace created a massive public outcry from religious groups and members of the U.S. Congress who believed that the guidelines would chill employee rights to exercise their religious beliefs freely. Several conservative religious groups vehemently attacked the guidelines as an illegitimate attempt to create a religion-free zone in the workplace, arguing that the guidelines would prohibit employees who said "God bless you" or who wanted to wear a cross or yarmulke at work. By contrast, several religious liberals favored the guidelines in some form, believing that workers should be protected from religious-based harassment. Indeed, mainline religious

groups defended the guidelines, maintaining that the terminology should be clarified, but not eliminated. Succumbing to substantial political pressure, the EEOC withdrew the guidelines and does not plan to revise them.

In light of the Commission's decision to withdraw the guidelines, this article analyzes religious harassment issues in the workplace. Specifically, this article: (1) discusses the potential conflicts between an employee's interest in freely exercising religious beliefs at work and an employer's interest in restricting religious harassment; (2) reviews several cases addressing religious harassment issues; (3) analyzes the EEOC's proposed guidelines on religious harassment; (4) contends that the Commission should revise the guidelines to mirror existing sexual harassment standards applied by the courts; and (5) offers employers practical guidance in addressing religious harassment issues.

RELIGION AND WORK:COMPETING INTERESTS

As represented in the hypothetical, a devout Christian may have an interest in discussing his sincerely held religious beliefs with his coworkers, but his employer, fearing Title VII liability, may have a compelling interest in restricting speech and conduct that have the potential for creating a hostile work environment. Given Congress's reticence to address the religious harassment issue, employers are placed in a precarious position - they alone must determine, without much guidance, whether religious proselytizing and symbols (such as a cross, the Star of David, or a yarmulke) represent conduct that is offensive to others and creates an abusive work environment. In light of the complex moral and political issues underlying religious beliefs and practices, the employer's task in defining religious harassment is an arduous one.

Unfortunately, many employers have not considered the real potential for religious harassment in the workplace. They should. Since the workplace is where people spend a significant part of their day, the work environment offers a forum for employees to express their opinions and ideas. They do not leave their religious beliefs at home. In the past decade, religion has played an expanding role in public life, primarily because people turn to faith or the transcendent as a source of love, hope or escape from the complexities, despair, and anxiety involved in day-to-day life. Also, the rise of the Religious Right and Christian fundamentalism has added a political dimension to the role of religion - one where the church not only preaches faith or belief systems, but also advocates religious-based, political activism. Religious belief has been transformed from what was traditionally a "private" matter to a powerful source of political activism. Accordingly, religious harassment is not an esoteric issue confined to the academic world; it is a real-world issue that appears with increasing frequency in reported cases.

As the American workforce diversifies to include people with varied religious beliefs, potential conflicts between an employer's interest in preventing religious harassment and an employee's interest in freely exercising religious beliefs will continue to grow. In 1993, for example, 16,000 harassment complaints were filed with the EEOC, nearly 800 of which were religious-related. In the sexual harassment context, many employers have adopted antiharassment policies because they are concerned with liability under state and federal employment discrimination statutes and common-law tort theories. These policies admonish employees about possible legal consequences and incorporate the harassment law standard, strongly implying that employers are influenced by the fear of liability. Employers that have been involved in harassment litigation are more likely to implement broad antiharassment policies to avoid future lawsuits. Further, an employer's incentive to prohibit conduct and speech that might constitute harassment has increased based on the Civil Rights Act of 1991, which subjects employers to liability for emotional distress and punitive damages.

To avoid liability, the prudent employer will proscribe all speech and conduct that may constitute harassment. The possibility of creating a "chilling effect" from prohibiting speech and conduct that may constitute harassment is outweighed by the risk of significant liability.

Harassment law may restrict protected speech and conduct, but the restrictions serve a compelling interest - an equal work environment for employees regardless of their race, sex, religion, age, disability, or national origin. Thus, the employer is engaged in a delicate balancing act, namely, weighing the individual and societal value of protecting employees from unlawful harassment against the value of free expression that harassment law suppresses. Some would argue that sex-based speech and conduct do not deserve much protection, while religious speech and conduct, as constitutionally protected activity, deserve special protection from the reach of harassment law. This article rejects that distinction, Contending that any religious-based conduct that is sufficiently severe or pervasive to create an abusive work environment is subject to an employer's restrictions.

THE TITLE VII SCHEME

Under Title VII, an employer may not discharge or otherwise discriminate against any individual because of the individual's religion. Likewise, Title VII prohibits an employer from limiting, segregating, or classifying employees or applicants in a way that would deprive them of any employment opportunities or adversely affect their status as employees because of their religion. Title VII also embodies an employer's duty of accommodation. That duty requires employers to reasonably accommodate an employee's religious observance or practice unless "undue hardship on the conduct of the employer's business" is involved. At least in part because of the tension

between Title VII's accommodation duty and the Establishment Clause of the U.S. Constitution, the Supreme Court has broadly defined "undue hardship" as any effect on business that is more than de minimis. Courts have also established that an employer is not required to accommodate one employee's religion by measures that adversely affect another employee.

In Ansonia Board of Education v. Philbrook,, the Supreme Court explained that employees are not entitled to a form of accommodation they prefer; rather, all Title VII requires of an employer is that it offer some form of accommodation, assuming that could be done without undue hardship. Where an employer has already reasonably accommodated the employee's religious need, the statutory inquiry is at an end. The employer need not further show that each of the employee's alternative accommodations would result in undue hardship. The cooperation of both the employee and employer is needed in finding a "reasonable accommodation that reconciles an employee's religious practice or beliefs with the needs of the employer's business." The "reasonable accommodation" concept under Title VII defies precise definition, and the statute offers no guidance for determining the degree of accommodation that is required of an employer. Despite this ambiguity, a reasonable accommodation includes any nondiscriminatory structure, procedure, policy, or method that may be implemented within the employment relationship and that permits an employee to exercise religious beliefs or practices without disrupting or conflicting with employment.

Wilson v. U.S. West Communications, Inc., vividly illustrates an employer's attempt to reasonably accommodate an employee's religious observance - an observance that coworkers found offensive. The Wilson court addressed the question whether U.S. West violated Title VII by terminating the employment of Christine Wilson because she refused to compromise her practice of wearing an antiabortion button at work. After U.S. West downsized its operations at several facilities, the company transferred Wilson to its Cumming Street facility in Omaha, Nebraska. U.S. West had no dress code at the facility where employees, including Wilson, "could wear whatever they wanted." As a Roman Catholic, Wilson made a religious vow or promise to God in July 1990 that she would wear a particular antiabortion button "until there was an end to abortion or until she would no longer fight the fight." She wore the button at all times unless she was sleeping or bathing. Measuring two inches in diameter, the button had a color photograph of a fetus depicted at the developmental stage between 18 and 20 weeks. The photograph was surrounded by a black background, and above the fetus' picture were the words "Stop Abortion." In smaller letters and slightly above the photograph were the words "They're Forgetting Someone." Wilson believed that if she took off the button, it would compromise her vow, and she would lose her soul.

Wilson's coworkers found the button offensive and asked her to stop wearing it. Explaining her religious vow, Wilson refused to stop wearing the button. The button continued to cause disruptions at work. Rather than doing their jobs, employees gathered and talked in the workplace. Also, a union representative told a company supervisor that some employees threatened to walk off their jobs because of the button. For example, company witnesses testified that some of Wilson's Catholic coworkers found the button offensive, very disturbing, and stressful. As a result of the coworker complaints, U.S. West offered Wilson several options. She could: (1) wear the button in her cubicle, but would be required to leave the button in her cubicle when she left the cubicle and moved around the office; (2) cover the button in some manner; or (3) wear a different antiabortion button with the same message, but without the photograph of the fetus.

Analyzing Wilson's Title VII claim, the court noted that a reasonable accommodation permitted the employee to practice her religious beliefs or practices without disrupting or conflicting with her employment. Referencing well-established Title VII principles, the court observed that any suggested accommodation would cause an "undue hardship" whenever it resulted in "more than a de minimis cost" to the employer. The court rejected two of the accommodations proposed by U.S. West. First, U.S. West's offer that Wilson remove the button while she circulated in the office was not a reasonable accommodation of her religious belief because her vow required her to wear the button except when she slept or bathed. Second, U.S. West's option that Wilson replace the button with another button was not a reasonable accommodation because Wilson made her vow in reference to the particular button she was wearing. Replacing the button with a different button without the picture of the fetus would not have permitted Wilson to wear the button encompassed by her vow. The substitute button accommodation did not allow Wilson to exercise her sincerely held religious practice at work.

Nevertheless, the court concluded that U.S. West had reasonably accommodated Wilson's religious observance by proposing that she, in some manner, cover the button while at work. Wilson's vow required her to wear the button - not to display the depicted fetus prominently at all times. She could continue to wear the button covered in some way, and this alternative would avoid the turmoil involving her coworkers. Finally, the court also determined that other suggested accommodations would cause an undue hardship to the conduct of the company's business. The loss of efficiency and productivity, as well as the expenditure of time and energy in attempts to alleviate the acrimonious atmosphere at the facility, presented more than a de minimis cost to U.S. West.

Similarly, transferring Wilson was not feasible because transfers were governed by a specific policy prescribed in a collective bargaining agreement between U.S. West and the union, and circumventing the procedures set forth in the agreement would have compromised the rights of Wilson's coworkers. In short, U.S. West had offered Wilson a reasonable accommodation by allowing her to wear the button with the fetus covered up and, in any event, the other suggested accommodations would have caused undue hardship to its business.

The Wilson decision exemplifies the tension between an employer's attempt to accommodate an employee's religious observance and coworker complaints that the observance is repugnant. If the employer does nothing about the complaints, it may be liable for religious harassment under Title VII. At the same time, the employer may accommodate an employee's religious practice, yet face the wrath of coworkers who believe that the employer has not done enough to restrict what they consider to be a repugnant religious practice. The Wilson decision also reveals that the employer is faced with the delicate job of juggling the employees' competing interests - the freedom to practice a religious belief versus the freedom from conduct that creates an abusive work environment.

DEFINITION OF HARASSMENT

The concept of "harassment" adds yet another complicating factor to the employer's balancing act. Under Title VII and analogous state antidiscrimination statutes, courts generally interpret the prohibition of discrimination based on sex, race, national origin, and religion to prohibit "harassment." Harassment law has largely developed in the field of sexual and racial harassment in the workplace. Sexual harassment claims under Title VII have developed under two distinct theories: "quid pro quo" and hostile work environment claims. The quid pro quo theory involves situations where an employee is forced to chose between submission to sexual demands or the loss of job benefits, promotions, or employment. The employee suffers an adverse consequence because of a superior's discriminatory behavior. The second and more complex category of harassment claims involves a hostile or offensive working environment.

In the sexual harassment setting, employees have a right to work in an environment that is not sexually hostile or offensive. Harassment by speech or nonspeech conduct violates Title VII if it is "sufficiently severe or pervasive 'to alter die conditions of [the victim's] employment and creates an abusive working environment' because of the worker's sex, race, religion or national origin." By contrast, isolated and infrequent insults generally do not create an abusive work environment, or the abuse may not be severe enough to drive the employee from the job. In Harris v. Forklift Systems, Inc., the Supreme Court recently affirmed that sexually discriminatory verbal intimidation, ridicule, and insults may be sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment that violates Title VII. The Court reasoned that whether an environment is "hostile" or "abusive" can be decided "only by looking at all the circumstances . . . [such as] the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."

CASE LAW ANALYSIS

Before the Supreme Court decided Harris, the lower courts developed several analytic approaches to determine whether an employee had stated an actionable religious harassment claim. In several cases, courts have applied well-established discrimination principles in reviewing employment decisions that are a mask for unlawful religious discrimination. As harassment law has evolved, some courts have applied legal standards used in the sexual harassment context.

RELIGIOUS-BASED TESTS

Interpreting Title VII's prohibition of religious discrimination in the workplace, courts have held that employees may state actionable religious harassment claims, especially when the employer applies religious requirements that affect terms or conditions of employment. The Sixth Circuit's decision in Blalock v. Metals Trades, Inc. is instructive. There, Blalock accepted employment with an openly Christian company and received permission to "bear witness" to clients. Blalock and the company's owner shared a relationship with the spiritual leader of Metals Trades. Shortly after he began work with Metals Trades, Blalock and the company's spiritual leader disagreed over religious matters, and their relationship soured. The spiritual differences continued and, eventually, Blalock was discharged. The Sixth Circuit reasoned that Blalock's religious views differed from his employer's, which was a factor in his discharge, therefore stating an actionable claim under Title VII.

Referencing the Blalock court's analysis, a Michigan federal district court recently addressed Kimberly Turic's claim that she was, let go because of her religious beliefs in Turic v. Holland Hospitality, Inc., observing that the Sixth Circuit recognized "employment atmosphere" religious discrimination claims. Turic, a 17-year-old single mother of one, had been part of Holland Hospitality's room service staff. While Turic was pregnant, rumors spread among her coworkers that she was considering an abortion. Apparently, several members of the hotel's "Christian staff" were offended by the abortion discussions. As a result, hotel management told Turic not to discuss her consideration of an abortion at work and warned her that if she did so, she would be terminated from employment. Turic had no negative entries in her personnel file about her job performance, but

eventually was discharged because she supposedly failed to keep the coffee urns full.

Challenging her discharge, Turic argued that the hotel fired her to protect the religious sensibilities of the staff, and that their religion was improperly forced on her. In essence, a religious test was established as a condition of her employment. To support her claim, Turic asserted that in response to the disruptive "uproar" over her abortion decision, she alone was disciplined and discharged -- the Christian staff members were not disciplined. Applying the "employment atmosphere" analysis to Turic's allegations, the court found that Turic had stated a cognizable claim of religious discrimination under Title VII. However, Turic failed to prove her "religious atmosphere" claim at trial. Unconvinced that the hotel had held Turic to a different disciplinary standard than other employees, the court noted that Turic had failed to satisfy her burden of proof. Turic did not present sufficient evidence that other staff members were treated more favorably than her because of their Christian beliefs. Turic also failed to establish any link between the hotel's negative reaction to her consideration of an abortion and her coworkers' religious beliefs.

In short, the Blalock and Turic decisions demonstrate that an employer may be subject to liability under Title VII if the employer applies a religious-based test in making employment decisions, particularly when the work environment is heavily charged with religious practices and beliefs. Unlike Blalock, however, Turic failed to produce sufficient evidence that her employer treated her less favorably because of her coworkers' religious convictions, nor could she show that her nonreligious views were a factor in the employer's decision to discharge her.

Employers should also be wary of converting the workplace into a chapel, temple, or other meeting place for religious observances. In Young v. Southwestern Savings & Loan Association, the Fifth Circuit found an employer liable under Title VII for sponsoring prayer sessions at work. Young accepted employment as a teller at Southwestern's branch office, knowing that all the employees were required to attend a monthly staff meeting at the downtown Houston office. Arriving at the first meeting, Young discovered that the meeting started with a short religious talk and a prayer, both delivered by a local Baptist minister. This bothered Young, who was an atheist. She later attended another staff meeting, which was inaugurated by a short devotional led by a Protestant cleric. Young did not object to the business portion of the meeting but felt that her freedom of conscience was violated by forced attendance at "prayer meetings." Young decided that she would no longer attend the meetings.

When confronted months later by the branch manager about her failure to attend the meetings, Young disclosed her objections to the religious content of the meetings and informed the manager that she would not attend the gatherings. In response, the manager informed Young that she had an obligation to attend the entire meeting and advised that if she objected to the devotional, she could simply "close her ears" during that time. Young then quit her job, stating that she could not attend the prayer meetings. The Fifth Circuit concluded that Southwestern constructively discharged Young because she was required to attend the prayer meetings - an intolerable and illegal employment requirement prohibited by Title VII.

Under the Young court's analysis, if an employer sponsors or creates religious-based activities in the workplace, whether it be a required prayer meeting, Bible study, or reading of the Torah, the employer risks Title VII liability. An employee may object to the religious activities, claiming that the activities create an improper religious-based test to employment opportunities or create an abusive work environment not tolerated by Title VII.(15)

* * *

TOTALITY OF CIRCUMSTANCES TEST

Adopting the standards applied in sexual harassment cases, several courts have in recent years looked to the "totality of circumstances" in deciding whether an employer has subjected an individual to unlawful religious harassment. In Turner v. Barr, the court upheld a finding of hostile environment, religious harassment based on the totality of circumstances. Turner was a member of the Jewish faith and claimed that the U.S. Marshall's service violated his right to a work environment free from religious discrimination. Recognizing that a single incident, without more, does not give rise to a Title VII action, the court noted that Turner must demonstrate a pattern or practice of harassment to fall under Title VII's protective cloak. Several incidents revealed that Turner was subjected to a hostile environment. Among other things, Turner was required to suffer reference to the Holocaust by one of his supervisory deputies. The deputy stated that the cost of Germany's reconstruction after World War II was high because of its high gas bill during the war. Further, the alleged harassment did not have explicitly religious overtones, but Turner was only required to show that the harassment would not have occurred "but for" his religion. After considering all the circumstances, the court concluded that the conduct of Turner's supervisors and coworkers was sufficiently pervasive to create an offensive work environment, reasoning that both the frequency of events and their severity justified this finding.

The Iowa Supreme Court applied a similar analysis in Vaughn V. AG Processing, Inc. Reviewing Iowa's counterpart to Title VII, the court recognized a religious harassment action, explaining that the harassment must be sufficiently severe or pervasive to alter the conditions of a plaintiffs employment. To assess the existence of a hostile environment, the court

looked to the "totality of the circumstances," examining the severity and number of alleged harassing incidents. The court also observed that in some situations the severity of the offensive conduct may lessen the need for sustained exposure. In the court's view several discriminatory anti-Catholic remarks targeting Vaughn may have been sufficiently severe or pervasive to alter the conditions of his employment, but the court did not reach the issue because the employer had taken reasonable steps to remedy the alleged discrimination.

In summary, courts have applied several tests in determining whether an employer is liable under Tide VII or a state law counterpart for religious discrimination and harassment. In cases where the employer has applied a religious-based test to the terms or conditions of employment, employers are usually liable for religious discrimination. In cases involving derogatory religious epithets, courts focus on the frequency and severity of the comments in deciding whether the verbal expressions are sufficiently severe or pervasive to create a hostile work environment. In recent years, some courts have applied a totality of circumstances test in religious harassment cases, borrowing the legal analysis used in the sexual harassment setting. In an effort to adopt a consolidated set of workplace harassment standards, the EEOC recently attempted to offer guidance in the religious harassment area, but substantial political pressure thwarted the Commission's efforts.

THE EEOC'S PROPOSED GUIDELINES

On October 1, 1993, the EEOC proposed consolidated guidelines related to harassment based on race, color, religion, gender, national origin, age, or disability. The Commission opined that it would be useful to implement consolidated guidelines enumerating standards for unlawful harassment in the workplace. Under the guidelines, harassment constituted "verbal or physical conduct that denigrates or shows hostility or aversion toward an individual because of his or her . . . religion . . . and has the purpose or effect of (i) creating an intimidating, hostile, or offensive work environment; (ii) unreasonably interfering with an individual's work performance; or (iii) otherwise adversely affecting an individual's employment opportunities."

The guidelines provided that harassing conduct includes, but is not limited to, "epithets, slurs, negative stereotyping, or threatening, intimidating, or hostile acts, that relate to . . religion. . . " The Commission also defined harassing conduct to include "written or graphic material that denigrates or shows hostility or aversion toward an individual or group because of . . . religion . . . and that it is placed on wars, bulletin boards, or elsewhere in the employer's premises, or circulated in the workplace." In determining whether speech or conduct is sufficiently severe or pervasive to create an abusive work environment, the guidelines focus on "whether a reasonable person in the same or similar circumstances would find the conduct intimidating, hostile, or abusive." Defining reasonable person, the Commission observed that it would consider the perspective of "persons of the alleged victim's . . . religion." Finally, the Commission stated that it would review the record as a whole and the "totality of the circumstances, including the nature of the conduct and the context in which it occurred."

A CRITIQUE OF THE PROPOSED GUIDELINES

The fundamental premise underlying the guidelines is sound, namely, to prohibit verbal intimidation, ridicule, insults, and other conduct that rises to the level of harassment prohibited under Title VII. Applying the well-established standards used in the sexual harassment context, the guidelines appropriately recognize that any "harassment" must be sufficiently severe or pervasive to create an abusive work environment. This standard does not proscribe innocuous religious beliefs, practices, or observances, such as wearing a cross, the Star of David, or a yarmulke; inviting a coworker to church; or just discussing one's religious beliefs with a coworker. Unfortunately, the guidelines contained several words and phrases that created a host of ambiguities and, in turn, engendered fear among many persons that the Commission was attempting to establish a religion-free zone in the workplace. These fears are misplaced; the guidelines may contain several ambiguities and overbroad terms, but they do not purport to prohibit all forms of religious expression in the workplace.

APPLYING THE HARRIS TEST

The Commission issued the proposed guidelines one month before the U.S. Supreme Court issued its decision in Harris. To allay any fears concerning the appropriate harassment standards in religion cases, the guidelines should mirror the sexual harassment standards applied in Harris. There, the Supreme Court admonished courts to review the totality of circumstances in assessing whether speech and conduct constitute actionable harassment under Title VII. Significantly, the Court enumerated several factors to guide a court's analysis:

* Frequency of the conduct, * Severity of the conduct, * Whether the conduct is physically threatening or humiliating, * Whether the conduct is merely an offensive utterance, and * Whether the conduct unreasonably interferes with work performance.

THE PROBLEMATIC HARASSMENT DEFINITION

Without the benefit of the Harris analysis, the EEOC confused the definition of "harassment" by adding superfluous language, such as "conduct that denigrates or shows . . . aversion toward an individual because of his/her . . . religion. . . ." This language should be modified to track the totality of circumstances test and factors set forth in Harris. The

Commission's newfound language clouds the harassment definition because it adds broad terms such as "denigrates" and aversion" - terms not used in the Supreme Court's sexual harassment jurisprudence. Under the Commission's vague definition of harassment, a person might believe that a coworker has shown an "aversion" to the person by asking him which church he attends or saying "God bless you." The "aversion" language does not appear in Harris, nor in any other court decision setting forth the accepted definition of workplace harassment. Commonly understood definitions of "aversion" include dislike and other words that suggest something less than hostility, insult, or ridicule. This potentially low standard for "harassment" could lead employers to police legitimate religious conversations and discussions in the workplace.

Additionally, the "purpose or effect" language is vague and improperly broadens the definition of actionable harassment. That language could make employers liable for innocuous and harmless actions lacking discriminatory animus. Indeed, even if the remarks were not intended to harass, under the "effect" terminology, the employer could not raise lack of intent as a defense. In short, the "purpose or effect" language is not consistent with Harris. Likewise, the Commission's use of the phrase otherwise adversely affects an individual's employment opportunities" is disturbing. This terminology creates a vast gray area about what the terms mean in comparison to established harassment standards predating the guidelines.

THE INDIVIDUALIZED REASONABLE PERSON STANDARD

The Commission's definition of "reasonable person" is too subjective, focusing on the perspective of the alleged victim's religion. Under this definition, taking into account the sensibilities of individuals in the same protected class as the alleged victim would require employers to know the varied religious practices of employees to avoid religious discrimination liability. This individualized reasonable person standard represents a significant and unwarranted departure from the objective reasonable person standard adopted by the Court in Harris because it places undue emphasis on individual characteristics and replaces a uniform standard of conduct with a confusing, highly fragmented legal standard.

PROPOSED REVISIONS

The Commission's guidelines represent a uniform approach to harassment in the workplace and were misinterpreted by conservative religious groups. When a person is subjected to repeated religious slurs (such as "goddam Jew" or "Christ-killer"), and the slurs are sufficiently severe or pervasive to create an abusive work environment, Title VII clearly affords protection to the victim. This is the easy case. The more difficult cases involve application of the Harris factors, namely, the frequency and severity of the conduct, whether the conduct was an isolated occurrence, and whether the conduct interferes with the alleged victim's work performance. The guidelines, however, contained words and phrases that created more ambiguity than they sought to abolish. These ambiguities, in turn, were interpreted by many as an illegitimate attempt to trammel on First Amendment rights to free expression and the free exercise of religion. Given the ambiguities in the guidelines, Congress compelled the EEOC to withdraw the guidelines, and the Commission has no plans to revise them. This is a mistake.

A revised and more tailored set of guidelines would be a useful tool for the courts, employment law practitioners, and human resources managers. The Supreme Court's Harris decision, coupled with several revisions to the guidelines, would strike the appropriate balance between concerns about religious freedom in the workplace and the elimination of prohibited harassment, including religious harassment. First, the Commission should revise the guidelines to mirror the Harris definition of harassment. Sex-based harassment may, in many respects, be different from religious harassment, but any form of discriminatory and abusive harassment under Title VII cannot be tolerated. The Harris factors go a long way to help employers ascertain what speech and conduct constitutes actionable harassment. Second, the EEOC must delete inappropriate and superfluous terms from the guidelines, such as "aversion," "denigrates," "purpose or effect," and "otherwise adversely affects an individual's employment opportunities." These terms are not part of the U.S. Supreme Court's Tide VII harassment jurisprudence, create further ambiguity, and raise significant First Amendment issues, primarily because the vague and undefined terms invite employers to prohibit afl religious discussion in the workplace to avoid Title VII liability. As drafted, the broad and undefined terminology in the guidelines would create a chilling effect on religious expression; to avoid liability, employers would prohibit discussion and expression related to religion.

Finally, the Commission should not overlook the existing line of court decisions addressing religious harassment in the workplace. Courts have applied a totality of circumstances test under Title VII and similar state antidiscrimination statutes in assessing conduct that might constitute actionable religious harassment. Plainly, repeated religious slurs over a period of time constitute actionable harassment. Moreover, if the employer knows or has reason to know that one of its employees is proselytizing to an unwilling coworker, and the coworker's performance is affected or the proselytizing is severe or pervasive, then the employer will probably be held liable for religious harassment under Title VII. Again, courts will review several factors to determine whether speech and conduct are sufficiently severe or pervasive

to create an abusive work environment. To adequately protect an employee's religious freedom, however, the standard for determining what speech or conduct is sufficiently "severe or pervasive" should be a rigorous one and applied from the standpoint of the objective, reasonable person approach adopted in Harris, not the viewpoint of the victim. The Commission's subjective approach would require the employer to be familiar with the varied religious beliefs of its employees-something not contemplated by Title VII. In short, the guidelines offer a useful tool to employers in determining what constitutes actionable harassment under Title VII. Unfortunately, they go too far and depart from established definitions of harassment, add broad and undefined terms, and place an unbalanced emphasis on the subjective perspective of the alleged victim.

RECOMMENDATIONS TO EMPLOYERS

The Commission's decision to withdraw the guidelines left a conspicuous void; employers were left with little guidance regarding the appropriate harassment standards applied in the religious harassment context. To fill the legal void left by the Commission, this article recommends that employers treat religious harassment the same as workplace harassment based on sex, race, national origin, age, or disability. Indeed, an employer's "harassment" policy and training programs should make it crystal clear that afl workplace harassment based on any of the protected categories, including religion, is strictly prohibited. As with any form of prohibited discrimination under Title VII, an employer has a compelling interest in restricting conduct or speech that is sufficiently severe or pervasive and creates an abusive work environment. Therefore, when confronted with a religious harassment complaint, employers should apply the standards developed by the courts in sexual harassment cases. Sexual harassment jurisprudence is far from stable, yet certain principles may be derived from the courts' decisions.

To assess whether a religious harassment complaint has any merit, the prudent employer will conduct an immediate and thorough investigation. The investigation will necessarily focus on: (1) the frequency of the alleged discriminatory conduct, (2) the severity of the conduct, (3) whether the conduct unreasonably interfered with a coworker's job performance or other condition of employment, (4) whether the conduct disrupted the normal operation of the employer's business, and (5) whether coworkers found the conduct offensive or threatening. For example, if a fundamentalist Christian employee proselytized to coworkers, and the proselytizing offended a coworker, the employer must ascertain whether the conduct created a hostile work environment. That determination will depend largely on the severity or pervasiveness of the "preaching." Over a three-year time frame, the fundamentalist may have informed coworkers on one or two occasions that the Bible was the true word of God and that the exclusive way to acquire eternal bliss was through Jesus Christ. These isolated discussions, however, would not satisfy the severity or pervasiveness standard. By contrast, an employer faced with repeated, unwanted "preaching" episodes that offend coworkers and adversely affect their working conditions is well advised to take swift remedial action.

Unlike these bright-line examples, however, most cases fall somewhere in the gray area. Accordingly, in addressing a religious harassment complaint, the decision maker's task will often require an uneasy balancing act. The employer must weigh its duty under Title VII to reasonably accommodate an employee's sincerely held religious belief against the duty to prevent religious. practices or observances that offend coworkers and create a hostile work environment. Allowing an individual to wear an antiabortion pin at work, a pin that is part of the employee's indigenous religious belief, might accommodate the individual's religious observance, yet at the same title offend coworkers and disrupt the normal operation of the employer's business. Under these circumstances, the employer must determine whether the proposed accommodation of the person's religious observance will create an undue hardship on its business. if the proposed accommodation offends coworkers and disrupts business operations, then the employer is arguably justified in restricting the person's religious observance.

Finally, some employers may have established religious traditions, such as an employer-sponsored devotional, prayer meetings, or readings from the Torah before a company meeting. Here, an employer should seriously consider whether the religious rituals or gatherings offend nonbelieving coworkers and ensure that they are not a term or condition of employment. However, even assuming that the religious gatherings are not a term or condition of employment, religious meetings or rituals that occur in the workplace expose an employer to a substantial risk of harassment liability from an employee who does not share his or her coworkers' or the employer's religious beliefs.

In short, based on these recommendations and the proposed revisions to the EEOC's guidelines, an employer may avoid collisions between religion and work and, at the same time, accept the diversity of its workers' religious beliefs and practices.

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94-2021 GERACI v. ECKANKAR

Gender—Church's discharge of excommunicated employee performing only secular duties—Establishment Clause—1993 Religious Freedom Restoration Act.

Ruling below (Minn CtApp, 526 N.W.2d 391, 66 FEP Cases 1622):

Establishment Clause and Free Exercise Clause bar court from deciding whether Eckankar, which is hierarchical church and religion that makes membership condition of employment, violated Minnesota Human Rights Act's sex discrimination and retaliation bans by discharging computer systems analyst purportedly on account of her excommunication, because further litigation would require questioning of church's monitoring of her adherence to church doctrine, its reasons for excommunication, and veracity of its responses; trial court erred in concluding that Free Exercise Clause did not bar review of analyst's sex discrimination and retaliation claims because it should have applied compelling interest test that was restored retroactively to Free Exercise Clause by enactment of 1993 Religious Freedom Restoration Act, but issue is moot because claims are barred by Establishment Clause and Minnesota Constitution's Freedom of Conscience Clause.

Questions presented: (1) Does First Amendment's Establishment Clause bar state statutory remedies against church for gender-based employment discrimination and reprisal when church terminated female employee performing only secular duties, ostensibly because she was excommunicated, and when sufficient evidence existed that reason claimed for her discharge was pretext for discrimination and reprisal? (2) Are duties of computer programmer purely secular or "core ecclesiastical matter" so as to constitutionally bar any judicial inquiry into question of whether petitioner's excommunication, as ostensible reason for discharge, was pretext for gender-based employment discrimination and reprisal under state law? (3) Is 1993 Religious Freedom Restoration Act unconstitutional?

Petition for certiorari filed 6/12/95, by Clay R. Moore, David J. Duddleston, and Mackall, Crounse & Moore PLC, all of Minneapolis, Minn.

GATHERING OF SOULS
Followers of the Eckankar Religion Meet in Minneapolis

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Martha Sawyer Allen
Staff Writer

Eckankar seeks to teach people ways to reach a universal human connection to the love of God, the Holy Spirit, or Eck, as followers call it. It was founded 27 years ago in California

They weren't welcomed when they built their international headquarters and temple in Chanhassen.

After all, even though they gave up the label long ago, they're basically New Age, and many people don't take kindly to anything that smacks of meditation, crystals, reincarnation and fuzzy notions.

But, really, they're followers of a religion that has grown over the 27 years of its existence, one that teaches ways to reach a universal human connection to the love of God, the Holy Spirit, or Eck, as they call it.

Eckankar - even the name sounds odd. But the movement, with more than 50,000 followers worldwide, is having a major gathering this weekend at the Minneapolis Convention Center.

More than 6,000 people are holding seminars on soul travel, meditation, dreams, spiritual energy and reincarnation. They're also reacquainting themselves with one another and meeting new friends.

"Eckankar teaches that the Eck, the voice of God, communications with all creation as light and sound," said Linda Anderson, spokeswoman for the sect. "This communication happens all the time, not just in church on Sunday or during certain heightened mystical experiences."

The religion teaches exercises that enable people to soul-travel, to experience dreams as reality and learn about past lives and the afterlife to open their hearts to the vastness of the love of God.

So what can be wrong with that?

Well, when the organization built its international headquarters near the intersection of Hwy. 5 and County Rd. 17 in Chanhassen five years ago, some local residents opposed it. They argued that the land was zoned for residential buildings and that the church would remove it from tax rolls. More important, some simply didn't like the sound of what the people would be doing there.

In 1992 and 1993, about a dozen incidents of vandalism to the temple and the 147 acres that surround it were reported.

At the time, Eck leaders said they didn't want to blow the incidents out of proportion, but the city was concerned. The vandalism has stopped, said Eckankar President Peter Skelskey, and he believes it won't happen again. He said that Eckankar gets along well with its neighbors.

Jim Eastling, one of the Chanhassen residents who disapproved of Eckankar's move into the city, said that he has grudgingly accepted the temple.

"They're just a building that sits there, and there are no problems I've been aware of," he said. "I just didn't want a group that taught the things they taught in our city. You can call it discrimination or whatever, but [the group is] accepted now. They don't seem to be going door to door. I do feel sorry for them because of what they believe. I so strongly disagree."

Eckankar headquarters sits atop a lovely hill covered with Minnesota wildflowers. Contemplation trails wind among the prairie acres surrounding the temple. Every effort is made to create a feeling of serenity and peace.

Leading a visitor through the complex, Skelskey proudly showed the ways architecture has been used to maximize light, air, contemplative spaces and a sensation of serenity. Almost 30 wall coverings were used in various rooms and hallways to create just the right feeling of peace, he said.

In many ways, the temple exemplifies this religion. It looks almost secular. There are few religious symbols, but there are many paintings and pictures designed to convey serenity and meditation.

Eckankar takes many of its teachings from ancient Asian beliefs and emphasizes spiritual practices more common in Eastern religions, but it is far more eclectic. An introductory pamphlet sums it up: "Eckankar, Ancient Wisdom For Today. How past lives, dreams, and soul travel help you find God."

Eckankar was founded in California. It's a loose organization with a spiritual leader, Sri Harold Klemp, who is revered as the Eck master but not worshiped as divine. It was Klemp's vision that brought the international headquarters to Minnesota.

Many Eckankar followers also belong to other religions, using the practices and philosophies they learn here in conjunction with their other faith. Eckankar leaders see no problem with that.

"Our mission is not to convert people, but to bring the message of the light and sound of God to those who've had the experience," Skelskey said.

Eckankar followers believe that we are all time-travelers who have had many lives and, therefore, experience past lives often in dreams or other existential experiences.

The Rev. Bruce Forbes, professor of religious studies at Morningside College in Sioux City, Iowa, has visited the Eckankar temple and studies what are known as marginal religions.

He believes Eckankar is a legitimate religion, but also believes that followers "don't draw distinctions, which is why scholars like me think it's all fuzzy - because they don't draw lines. They say it's whatever you want it to be."

However, he doesn't believe it's a cult. That label is leveled by people who don't know, and therefore fear, the religion, he said.

"My perception is when the New Age was just coming in, Eckankar talked about itself as a New Age religion" but later dropped it, he said. "To me it doesn't matter. Who knows what New Age is? There are no card-carrying New Agers.

"I don't use the label much. Nowadays it's mostly used by fundamentalists who want to attack it."

He and Mary Farrell Bednarowski, who studies new religions and teaches at United Theological Seminary in New Brighton, believe that Eckankar meets their definition of a religion. It has a sense of the transcendent; it has a body of teaching and a sense of the nature of human beings.

What it doesn't have, Forbes says, is much of an ethical teaching. It's very much an individual religion.

David Clark, professor of theology at Bethel Theological Seminary in Arden Hills, said: "The experience of personal fulfilment is more important [in religions like Eckankar] than a relationship to a transcendent God. It becomes a psychological connection. The words are often the same, but it's not the same God of the theistic religions, particularly Judaism and Christianity."

Skelskey said, "We try to open up to people. Once they see what we are saying, they realize we're just like them. People are fearful because they don't know we still love God. Maybe we worship differently, but it's important that we're all people - soul - and it's important to uplift the world by our state of consciousness. Love is an overused word. We keep asking, 'How much compassion do you have for others?' "

94-1903 HOCHBERG v. HOWLETT

Action alleging conspiracy to interfere with right to practice—Non-compliance with discovery order—Disclosure of members' identities.

Ruling below (CA 2, 50 F.3d 3):

District court's dismissal of complaint with respect to individual defendant and imposition on plaintiffs of sanctions for discovery abuses under Fed.R.Civ.P. 37 when plaintiffs refused to produce documents and failed to appear for depositions are affirmed; plaintiffs' action was willful to extent that their refusal to comply included matters not legitimately subject to claim of confidentiality, and court, after considering competing interests of parties, including plaintiffs' assertion that their failure to comply with discovery orders was justified by need to protect identities of members of plaintiff religious organization, issued appropriate protective order; grant of summary judgment in favor of defendant anti-cult organization is also affirmed; facts cited by plaintiffs to support their allegations that organization conspired to inhibit their First Amendment rights in violation of 42 USC 1985(3) fail to establish connection between organization and actions described in complaint.

Questions presented: (1) Is fundamental right of dissident plaintiff association to enforce its First Amendment protections on behalf of its members by class action (brought to preserve members' anonymity against victimization by co-conspirator defendants) abridged or chilled by discovery order to divulge all identities of its members under pain of dismissal, or does membership disclosure abridge right to sue in such cases? (2) Was it failure of due process to require dissident plaintiff association to establish more than circumstantial "possibility" of conspiracy to defeat summary judgment before completion of discovery? (3) What is appropriate standard to be applied to discovery issues in such actions to enforce constitutional protections? (4) Did actions of court of appeals in affirming district court's disclosure of member identity and requiring more than circumstantial possibility of conspiracy to defeat summary judgment prior to discovery completion conflict with decisions of this court and sanction departure by district court from accepted and usual course of judicial proceedings?

Petition for certiorari filed 5/17/95, by Ian Anderson, of New York, N.Y.